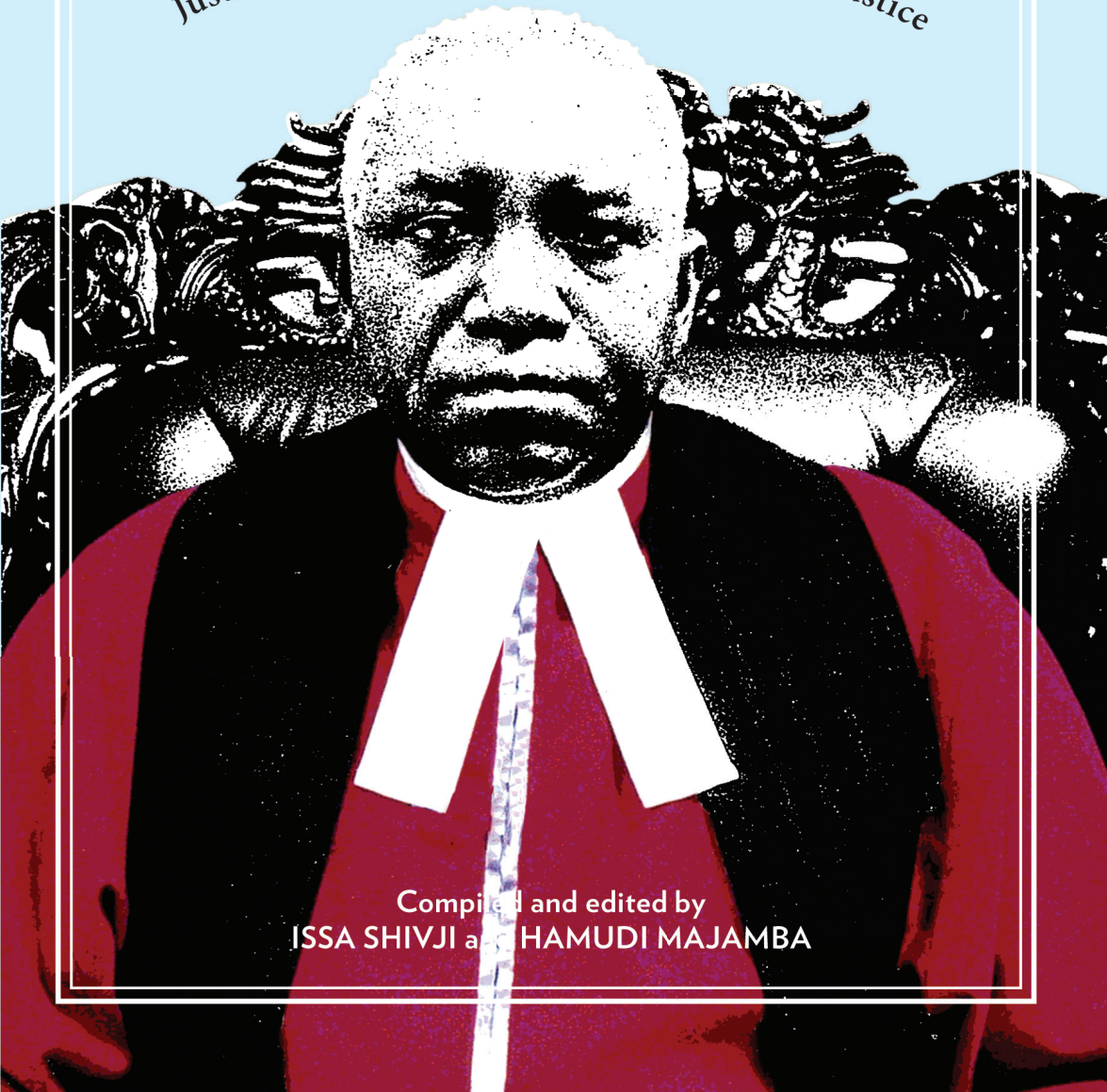


RULE OF LAW VS. RULERS OF LAW

Justice Barnabas Albert Samatta's Road To Justice



Compiled and edited by
ISSA SHIVJI and HAMUDI MAJAMBA

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Foreword

*Dr. Asha Rose Migiro,
Deputy Secretary-General, United Nations.*

Retired Chief Justice Barnabas Albert Samatta has made an outstanding contribution to strengthening the rule of law in Tanzania. This volume showcases some of his most notable writings, and documents his life and career, as well as the views of his peers. The portrait that emerges is of a well-rounded practitioner, a man of prescience who pursued important causes long before many others, and a leading judicial voice who, over decades, rendered groundbreaking decisions in criminal, public, constitutional and environmental law.

As such, this book is not just an historical account but offers lessons for global efforts to strengthen our work for international justice and peace. In my capacity as the Deputy Secretary-General of the United Nations, I strive to coordinate the United Nations' efforts to strengthen the rule of law at both the international and national levels. From this global perspective, I can only emphasise how critical national practitioners of the stature of Judge Samatta are for strengthening the rule of law at the country level. Without such robust expertise and leadership, the promise of international law would not be accessible to those most in need of the protection it affords.

Activities to improve access to justice, legal assistance and protection, especially for the poorest and most vulnerable, are central to the United

Nations' approach to strengthening the rule of law. As a former Legal Aid attorney, I was especially moved to read the first-hand accounts of Judge Samatta's deep commitment to ensuring access to justice for all. He consistently advocated for the right to legal representation, including for the most indigent, arguing that "legal aid should be the right of every poor person and a constitutional obligation of the government".

He has been equally passionate on the need for the legal profession itself to uphold the highest ethical standards, a stance for which he was widely known and admired. He has taken the view that the law, rather than powerful individuals, should rule, calling on fellow judges to "have the courage to say no to those in society who wish to rule the law". And he steadily defended the independence of the judiciary, striking down legislation he found to be unconstitutional. In his own way, Judge Samatta has thus greatly contributed to the rule of law, which the Secretary-General of the United Nations has defined as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."¹

In these times of great turbulence, the mission of the United Nations to strengthen the rule of law is more critical than ever. Without, at the national level, the leadership of eminent jurists of the calibre of Judge Samatta, the United Nations' efforts to this end would be in vain. I thus commend this volume on Judge Samatta to all those who share our determination to achieve this noble goal. Both his writings and his life offer profound insights on the way forward.

1. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, S/2004/616

PART I

Justice Samatta's Road to Justice: An Introduction

Issa Shivji & Hamudi Majamba

The road to justice is the only road a judicial officer should travel on. He or she must not even contemplate travelling on the road to political convenience or compromise of principles. (Justice Samatta's farewell speech on the occasion of his retirement, 19th July 2007, Court of Appeal Grounds, Dar-es-Salaam)

Introduction

Mr. Justice Barnabas Albert Samatta retired from the bench in July 2007 after a distinguished legal career spanning 41 years. Of the four decades of active life, he was a State Attorney for a decade, half of which he was the Director of Public Prosecutions. For the rest of the period, he was at the bench of the High Court of Tanzania and ten years in the Court of Appeal, the highest court of the land. At his retirement, he had spent seven years as the Chief Justice of the country, thus at the helm of one of the three major branches of the State. Unlike the ‘mother country’, Britain, from whom Tanzania inherited its judicial system, the country has a written Constitution, which prescribes separation of powers in Article 4.

Justice Samatta has the distinction of being the first Chief Justice to have graduated from the country’s first local university. His predecessor, the late Justice Francis Nyalali, a first generation post-independence lawyer, was trained at the London Inns of Courts. Nyalali was among the first ten or so young men sent to Britain to study law just when independence was around the corner.

In this book, we have reproduced some of the leading judgments written by Justice Samatta. What comes through every page of the judgments, papers and speeches is the Justice’s extreme conscientiousness in discharging his judicial duty and dispensing justice. Barnabas Samatta took his judicial oath seriously thus becoming a role model for the younger generation. At a farewell seminar held by his *alma mater*, the University of Dar es Salaam, the Vice-Chancellor, Professor Rwekaza Mukandala, recalled the first time he saw the former Chief Justice. Justice Samatta was then prosecuting a case in the Tabora High Court. The young man Rwekaza had played truant to attend court sessions. He was sitting in the public gallery. When he saw and heard Samatta arguing, he told himself: I wish to be a lawyer like Mr. Samatta. In the event, he did not become a lawyer; instead he chose the less arduous path of a political scientist!

In this short essay, we cannot do full justice to the illustrious judicial writings of Justice Samatta; instead we will only highlight, in a critical fashion, some of the high points of his beliefs and observations as embedded in his decisions and speeches. As life-long academic teachers at the Faculty of Law, University of Dar es Salaam, we believe the life and career of a high judicial officer should be an example to the younger generation of lawyers. In our situation, the legal profession, whether at the Bar or the bench, is perceived in a very negative light.

Often this is not without reason, notwithstanding the protestations by lawyers about the nobility of their profession. Lack of integrity and unethical practices among some practicing lawyers, allegations of corruption against the bench and State Attorneys are not uncommon. Aggrieved members of the public perhaps may exaggerate their stories, but, even if the allegations contained a grain of truth, it is bad enough. When some of us who have practised at the Bar can vouchsafe that in real life there is more than a grain of truth in these charges and perceptions, it is worse. Thus, an example of an ethical lawyer whose integrity cannot be questioned, however solitary, should be advertised from the rooftops in the hope that it will be seen as a worthy role model for the young generation to emulate and draw inspiration from. Mr. Justice Barnabas Samatta is such an example.

Rule of Law and Constitutionalism

It would be fair to say that many of Justice Samatta's decisions, especially at the bench of the Court of Appeal, are in criminal cases. This may have something to do with the fact that he practised as a State Attorney for almost a decade during the time when the majority of a State Attorney's workload was prosecution. No doubt, he carried the expertise in criminal law to the bench. During much of the 60s, 70s and 80s, civil proceedings against the Government tended to be rare. The Government Proceedings Act² allowing private persons to bring civil proceedings against the government, although enacted in 1967, was brought into force only in 1974³. Then the Act was amended in the same year reintroducing the requirement of the Attorney General's consent as a prior condition before the suit could be heard.⁴ Consent was a rarity. In any case, the Attorney General took his time in giving consent. This provision was heavily criticized by academics on the ground that it denied a citizen access to justice and placed the government above law.⁵ Eventually, the consent provision was declared unconstitutional in the

2. Act No. 16 of 1967.

3. GN No. 308/1974.

4. Act No. 40 of 1974. The previous law, the Government Suits Ordinance (Cap.5 of 1964 Revised Law), which required consent had its 'roots in ancient English Constitutional mythology about the divine nature of kingship', that is the doctrine that the 'King does no wrong' and that the 'King is above law' (see Martin, 1974: 132).

5. See, for instance, Peter, 1991:180-182, Wambali, 1985 (LL.M. dissertation) and Shivji, 1990.

early 1990s during the time when there was a spate of cases premised on the Bill of Rights challenging oppressive laws and practices.⁶

The situation was not very different on the public law front either. Until 1984, the Constitution of the State did not contain an enforceable bill of rights. As a result, litigants did not have a solid ground for anchoring their cases against the State for abuse of power. Although the other branch of public law, judicial review, which was inherited through the reception of common law, was available, litigants hardly used it partly because private lawyers were not creative enough and partly because they did not wish to incur the wrath of the State.⁷ It was the Legal Aid Committee of the University of Dar es Salaam that began using judicial review in the 1980s to challenge decisions of quasi-judicial tribunals involving labour cases. Since then there has been enormous development in judicial review litigation, including, a series of very interesting, albeit not very successful, legal challenges mounted by trade unions against privatization of public property in the 1990s.⁸

Once the doors opened up, and public law litigation was placed before Justice Samatta, he applied his lucid intellect in constructing some leading judgments in Constitutional and judicial review cases. We would like to touch on a few of his decisions, which, in many ways were path breaking.

Vidyadhar Girdharal Chavda v. The Director of Immigration Services is one of the leading judicial review cases decided by Justice Samatta when he was still at the High Court. Chavda had been declared a prohibited immigrant by the Director of Immigration and was about to be deported when his lawyer lodged a judicial review application for prerogative orders. Following the procedure taken from common law, the judicial review application has to be in two stages, first the leave stage after which the substantive application is heard. While the hearing of the leave application was still pending, the lawyer also applied for an injunction to prohibit relevant authorities from deporting his client. The question before the Court was whether the court has jurisdiction to issue injunctive orders against the Government in view of section 11 of the Government Proceedings Act, 1967. Section 11, which enables

6. *Peter Ng'omango v. Gerson M. K. Mwangwa & Another*, Civil Case No. 22 of 1992, High Court of Tanzania at Dodoma (unreported but can be found in Kijo-Bisimba & Peter, 2005: 319-333. *Pumbun & Another v. Attorney General & Another*, Civil Appeal No. 32 of 1992, Court of Appeal of Tanzania at Arusha, [1993] 2 LRC 317.

7. The authors of the Filmup Project, for example, noted that between 1921-1982, there were only 30 reported judicial review decisions. For discussion see Shivji, 2006.

8. For a review of some of these cases see Shivji, 2006.

private civil proceedings against the Government, stipulates that where an injunctive relief is sought in proceedings against the Government, the Court shall not grant such relief but instead make an order of declaration. Relying on the important decision of the House of Lords (*M v. Home Office*⁹), Justice Samatta decided that the Government Proceedings Act dealt with civil proceedings against the Government as a species of *private law* while judicial review proceedings are in the nature of *public law* proceedings. The distinction between private and public law, and judicial review proceedings as public law proceedings, was a very important contribution to local jurisprudence. Our lawyers, and even the bench, have a rather narrow understanding of public law and often fail to appreciate that the supervisory jurisdiction of the High Court is an important branch of public law. Its procedure is *sui generis* as developed through common law and ought not to be subjected to the Civil Procedure Code.

Before Samatta's ruling in *Chavda*, Justice Mapigano, one of the astute and sharp-witted judges who have served on the High Court bench in Tanzania, had arrived at similar conclusion in the case of *Kahama Gold Mines v Minister for Energy*.¹⁰ In that case, the applicant was applying for temporary injunction at the leave stage pending the hearing of the application for prerogative orders. The State Attorney raised two objections. First that the applicant's lawyer had wrongly cited Orders 37 rules 1 and 2 of the Civil Procedure Code, 1966 as the enabling provisions. Second that injunctions could not be granted against the government because section 11 of the Government Proceedings Act provided that where a court was minded to do so, it should instead make a declaratory order. The applicant's Counsel responded by arguing that he had no alternative but to cite the provisions of the Civil Procedure Code because the Chief Justice who was supposed to make rules prescribing the procedure for applications for prerogative orders had not done so. He further argued that the Government Proceedings Act did not apply to judicial review applications. Justice Mapigano agreed with the applicant's counsel on both grounds but for different reasons, which need to be quoted. Judge Mapigano reasoned that injunctive reliefs did not require any enabling statutory provisions because 'independently of any question as to statutory provisions the High Court has in general original and independent jurisdiction to issue interlocutory orders to prevent what it

9. [1993] 3 All E.R. 537

10. Miscellaneous Civil Cause No. 127 of 1989, High Court of Tanzania at Dar es Salaam (unreported). It speaks volumes about our reporting system that such a path breaking decision has not been reported in our law reports.

considers continuing or intended injury to a party where it appears to the court to be just as well as convenient.' The idea that the High Court has original and unlimited jurisdiction to make certain orders, including granting injunctive reliefs, is grounded in the principles of equity. In the case of *Baraza la Wanawake Tanzania (BAWATA) & 5 Others v. Registrar of Societies & 2 Others*,¹¹ which was a Constitutional petition and the petitioners were applying for a temporary injunction, the late Justice Katiti followed *Kahama* and went on to hold that 'the High Court as a Court of Equity, has inherent power to issue interim reliefs ...'

On the applicability of the Government Proceedings Act, Justice Mapigano made a distinction between public and private law. He held that judicial review proceedings are in the nature of public law proceedings; that the Government Proceedings Act was to make it possible for an individual to proceed against the Government for getting certain reliefs that would be available to him in private law. He concluded by saying that the Government Proceedings Act was not applicable in public law cases. Justice Katiti applied the same reasoning in the case of BAWATA.

Thus *Kahama* decided in 1990 was ahead of the House of Lords decision in *M. v. Home Office*. It was a path breaking ruling but unfortunately not available to Justice Samatta. In *Chavda*, therefore, Justice Samatta arrived at similar conclusions independently. In fact, Justice Samatta took a robust view on individual rights with the following conclusion:

Except to autocrats, it must be intolerable that, in a democratic society like ours, courts should be impotent to grant a temporary injunction in favour of an individual who complains of unwarranted or oppressive use of statutory powers by a government minister or official. It should be made perfectly clear, I think, that this Court can halt the bulldozer of the State before it squashes the right of an individual, company or society.

In spite of his bold and courageous position stated openly in favour of individual rights against the abuse of powers of the State and State officials, he was deeply conscious of the limits of judicial activism, in particular against the State. He cautiously and carefully treaded on the thin distinction between the political and the legal, as even the most radical judges do all the time. At the end of the day courts are an institution of the State, to reinforce, uphold and legitimize the status quo. In the case of *Mwalimu Paul Mhozya v. Attorney General*, the applicant was seeking an interlocutory injunction to restrain the President of the United Republic from carrying out his Presidential functions pending

11. Miscellaneous Civil Cause No. 27 of 1997, High Court of Tanzania at Dar es Salaam, (unreported).

the hearing and determination of the main application. It was an application for declaratory orders to the effect that the President had violated the Constitution by allowing or enabling Zanzibar to become a member of the Organization of Islamic Conference (OIC) and that it was unconstitutional and potentially dangerous for the well-being of the people of Tanzania to allow him to continue to exercise Presidential powers. The case was undoubtedly politically sensitive and to some extent provocative. Yet, Justice Samatta heard it with great judicial propriety and decorum holding, among other things, that, 'It is wrong for a court of law to be anxious or to appear to be anxious to avoid treading on executive toes.' (p.132). The judge returned to the question of rule of law, reiterating his unshakeable conviction that it is the law, and not the rulers, that rule.

The notion, apparently harboured by some people in this country that the President of the United Republic Tanzania is above the law is subversive of the Constitution and the laws. All Government leaders, including the President, are, like the humblest citizen, bound to comply with the laws of the country. The maxim 'The King can do no wrong' has no place in our law even if the word 'President' is substituted for the word 'King.' (p.133)

Given the background of a country like Tanzania which had a very popular and charismatic leader in a one-party system where the President had massive powers, albeit Constitutional, it was important to reemphasize that even the President was not above the law. In many African countries Presidents did behave as if they were above the law attracting to themselves the label 'imperial presidency' from academic commentators. Mwalimu Nyerere himself once quipped that the Constitution gave him enough powers to be a dictator. He was not, and Tanzanians loved him because of that. But the same cannot be said of the Constitution, which created the perception, widely shared both by the rulers and the ruled, that the President's word was law. In the *Mhzoza* case from which the above quote is taken the Judge took a most prudent position without appearing to be subservient to the Presidency or the Executive. The Constitution provides for separation of powers and has elaborate provisions and procedure for the impeachment of the President under certain circumstances. But the power to impeach the President and suspend him in the process and eventually remove him is exclusively vested in the National Assembly. Justice Samatta used the separation of powers doctrine combined with the provisions of impeachment to anchor his decision that the Courts did not have power to suspend and or dismiss the President. That power was 'the

legislature's exclusive prerogative.' (at p. 138A)

The fact that where necessary Justice Samatta would tread with prudence the thin line between politics and law, did not mean that in appropriate cases he would shy away from picking up cudgels against the Executive, or for that matter, strike down legislation which he found to be unconstitutional. He was even prepared to read into the otherwise clearly stated law, principles of fairness and equity. In the case of *Tanzania Air Services Limited v. Minister of Labour & Others*,¹² Justice Samatta quashed a decision of the Minister of Labour because the Minister did not give reasons for his decision. Under the Security of Employment Act, 1964 (now repealed), a reference from the Labour Conciliation Board lay to the Minister of Labour whose decision was final and conclusive. The statute did not require the Minister to give reasons. The practice, which had survived unchallenged for almost 30 years, was for the Minister to confirm, reverse or modify the decision of the Board without giving any reasons. Justice Samatta clearly frowned on this practice arguing cogently that no public authority should be allowed to get away from making reasoned decisions affecting the lives of citizens for a decision without reasons is as good as no decision. The Justice recognized that there was no general rule in common law that a public authority is bound to give reasons. Nevertheless, he was prepared to modify the common law rule in the interest of fairness and justice. '[G]iving reasons for a decision constitutes a recognition that the parties are rational beings.' (at p. 222A). 'I think it is intolerable in a democratic society that the law should allow a decision-maker to whom an appeal or reference is made to make his decision without giving reasons why he has reached that decision.' (at p. 223G).

In the case of *Said Juma Muslim Shekimweri v. Attorney-General*, the President had retired a civil servant 'in public interest,' a common practice then, the applicant was challenging the decision by way of an application for judicial review. Justice Samatta declared in no clear terms that the common law rule that a civil servant was employed at the Crown's pleasure had no application in Tanzania. He observed that: 'The saying 'whatever pleases the emperor has the force of law' forms no part of our law.' (at p. 10B)¹³

* * * * *

12. [1996] T.L.R. 217.

13. Regrettably the Court of Appeal later reversed this decision of the High Court on different grounds based on the interpretation of Civil Service Rules.

During his tenure as Chief Justice, Justice Samatta, in his judicial decisions, and more in his speeches and extra-judicial statements, has significantly contributed to Constitutional jurisprudence. One of his best decisions which will stand the test of time is *Julius Ishengoma Francis Ndyanabo v. The Attorney General*¹⁴. In this case, Julius Ndyanabo filed a petition under the Elections Act, 1985, challenging the Constitutionality of section 112(2), (3) and (4) of the Act. Ndyanabo had stood for a Parliamentary seat in the General Election of 2000 and was defeated. Dissatisfied, he challenged the results in the High Court by filing a petition. The Elections Act had been amended in 2001 by introducing a new subsection which stipulated that the registrar shall not fix the hearing date of the petition 'unless the petitioner has paid into the court, as security for costs, a sum of five million shillings in respect of the proposed election petition' (section 111(2)). Before this amendment the security of costs was provided for under the Election (Election Petitions) Rules, 1971 made by the Chief Justice. In terms of rule 11, a petitioner was required to deposit five hundred shillings as security for costs but the Court was given discretion, on application, to permit a petitioner to give any other kind of security or even be exempted from any security in the case of an indigent petitioner. In legal aid cases filed by specified legal aid organizations, the petitioner was exempted from depositing any security.¹⁵ The amendment raised the amount to five million while leaving no discretion to the Court in the case of indigent petitioners. The appellant's argument was that this provision was unconstitutional on the ground that it breached the fundamental right of equality before the law and the right of unimpeded access to justice since poor litigants would not be able to have their petitions heard.

Justice Samatta who wrote the Court's judgment accepted the appellant's position underscoring the point that all other fundamental rights would be rendered meaningless if a person who could not afford security would be denied access to courts. In a lucid judgment running

14. Civil Appeal No. 64 of 2001, Court of Appeal at Dar es Salaam, [2004] TLR.14; [2002] 3 LRC 699.

15. This amendment to the Rules was inserted by the Chief Justice in the 1980s after the case of *Martha Michael Wejja v. The Attorney and 3 others* [1982] TLR.35. Wejja had filed an election petition with the assistance of the University of Dar es Salaam Legal Aid Committee. In accordance with the then prevailing practice, the petitioner did not pay any court fees nor deposit security on the strength of a legal aid certificate issued by the University Legal Aid Committee. Nonetheless, the respondent raised an objection on the matter. Although the petition was eventually heard because the petitioner was given time to deposit security, it became a public issue resulting in the Chief Justice amending the rules regularising the practice by passing a formal rule.

over forty-three pages, Justice Samatta laid down some general principles on the approach of the court in human rights cases emphasizing that courts needed to give fundamental rights provisions a purposive and expansive construction to enable the enjoyment of human rights to the fullest extent. The court considered access to justice as the core of fundamental rights. The following conceptualization by the Court undoubtedly took Constitutional jurisprudence a great step forward in understanding the foundations of the Constitution. Agreeing with the submission of the Counsel,¹⁶ the Court speaking through Justice Samatta said:

We agree with Prof. Shivji... that the Constitution rests on three fundamental pillars namely, (1) rule of law; (2) fundamental rights; and (3) independent, impartial and accessible judiciary. These three pillars of the Constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof. Shivji, it is access to justice which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day...

Access to courts is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.

The *Ndyanabo* decision became quite controversial because the then Speaker of Parliament, Pius Msekwa, picked up cudgels against the judiciary in the public by penning a number of strident articles in the newspaper. The Speaker's argument rested on the sovereignty of Parliament and that the court had no business in striking down legislation passed by the Parliament. Msekwa characterized his intervention as 'one solitary voice desperately shouting in courageous defence of our Parliament's legislative powers against unfair assault by the Judiciary'.¹⁷ In spite of somewhat unParliamentarily language used by the Speaker, Justice Samatta remained calm and maintained his judicial decorum throughout the public debate. The Tanganyika Law Society reacted with

16. The Counsel was Professor Shivji, one of the editors of this book who argued the appeal on a *pro bono* brief.

17. Pius Msekwa, 'Parliament's dilemma caused by the Court's statement in the 14th February decision of the Court of Appeal of Tanzania'. Reprinted in *Bunge News*, Vol. 16, July 2002, p. 10 at p. 17.

a press statement followed by a seminar at which one of the editors of this book (Professor Shivji) had the opportunity to present a paper on the 'Constitutional Limits of Parliamentary Powers'.¹⁸ The Speaker did not remain quiet. In a *Rejoinder* to the Law Society's press statement he went even further literally calling upon the Parliament to check the powers of the judiciary by passing legislation to nullify the Court's decision. He stated:

I strongly believe that this so-called "land-mark judgment" of the Court of Appeal is an appropriate and ideal case where Parliament should exercise its Constitutional check on the Judiciary, by quickly enacting a new law which will undo the damage caused by this particular judgment in which, by denying them access to a reasonable deposit of costs, justice was effectively denied to the poor respondents in election petition cases. [*Bunge News*, July 2002, p. 26]

Regrettably, the Parliament dominated by the Speaker's Party, passed legislation virtually nullifying the effect of the landmark (not 'so-called') case of *Julius Ndyabo*. The legal fraternity (including the bench, the Bar and academic lawyers), however, remained steadfast in their resolve to protect the advances made in Constitutional activism. More recently, though, Constitutionalism received another blow, this time around not from the Executive or even the Parliament but from the judiciary itself.

In the case of *Attorney General v. Mtikila* (Civil Appeal No. 45 of 2009), the seven-judge bench of the Court of Appeal delivered a judgment on 17th June 2010 in effect saying that the power of the Parliament to amend the Constitution was unlimited and absolute so long as it followed the procedure of amendment. Thus they overturned the judgment of the High Court (*Mtikila v. Attorney General*,) (*Mtikila I*) which had struck down the Constitutional amendment (Act No. of 34 of 1994), thereby allowing independent candidates. The gravamen of the Court of Appeal's decision was that the 'basic structure' doctrine does not apply to Tanzania because the 'basic structures' are not specified in the Constitution. To understand the implication of the *Mtikila II* decision, we need to retrace our steps to *Mtikila I*.

In one of the celebrated judgments of the High Court (*Mtikila v. Attorney General*, [1995] T.L.R. 31) the late justice Lugakingira decided that independent candidates had a Constitutional right to stand for elections. This decision in effect, therefore, held that the court would strike down certain provisions of the Constitution itself if they

18. *The Lawyer* (Special edition, October 2003). The article covers the whole episode making the case of *Julius Ndyabo* one of the landmark decisions of Justice Samatta.

conflicted with the fundamental human rights. The legislature, instead of appealing the decision amended the Constitution making it clearer that one of the qualifications for standing for elections was that the candidate must be a member of a political party and must have been nominated by that party. This set limits to the powers of the legislature to amend the Constitution. As has now become an established doctrine in a number of Commonwealth jurisdictions, while the legislature can amend any provision of the Constitution in its constituent capacity, it cannot alter or amend in a fashion that would amount to changing the 'essential features' or basic structure of the Constitution.

The 'basic structure' doctrine ought not to be confused with entrenched provisions of a Constitution where the Constitution itself limits the power of the Parliament to amend certain specified provisions of the Constitution by, for example, requiring a referendum before such a provision can be amended. In this regard, the Union Constitution of Tanzania does not have any entrenched provisions.¹⁹ The 'basic structure' doctrine has been developed by Courts. Its central premise, as elaborated at length in the leading judgment of the Indian Supreme Court (*Kesavananda*²⁰), is that the Constitution was ordained by the people through their Constituent Assembly, a body higher than the Parliament. The Parliament itself is the creature of the Constitution. It is the Constitution, which provides for the special procedure for amending it. Therefore, when the Parliament amends the Constitution, that is, when it exercises its constituent capacity, it is still acting within the powers given to it by the Constitution. Reading the Constitution as a whole, the court derives the intendment of the people which shows that the polity and the Constitutional order thus established has certain identity and character – for example, a republic as opposed to a monarchy, a democracy as opposed to an autocracy, etc. – which is immutable. Thus while they have given the Parliament powers to amend any provision of the Constitution, the people, acting through their Constitution, could not have intended that the Parliament could alter the basic structure of the Constitution. For example, to put it rhetorically, can the Parliament acting under its powers to amend the Constitution repeal and replace the whole 1977 Union Constitution? Or, even at a lower level: would it be Constitutionally valid for the Parliament, following the procedure set

19. The Tenth Constitutional Amendment, 2010 in Zanzibar for the first time has entrenched certain provisions of the Zanzibar Constitution. The entrenched provisions cannot be amended by the House of Representatives without a referendum.

20. *Kesavananda v. State of Kerala* 1973 S.C.1461

in the amendment provision, that is, article 98, amend the article doing away with the requirement of two-thirds majority and substituting it by one-fifth of the members present and voting?

Mtikila II was not well received by the public or the legal fraternity. The full implications of the decision have yet to be teased out. One thing is clear though: it has left the door wide open to any unprincipled Executive, with a two-thirds majority in Parliament, to play havoc with the Constitution.²¹

* * * * *

Finally, one of the most important contributions of Justice Samatta to Constitutional jurisprudence needs to be mentioned. In an important speech to the Parliament on 21 November 2000 Justice Samatta made two fundamental points.²² He argued that the Constitution is not a contract between the rulers and the ruled, the common legal fiction propagated by lawyers and laymen alike in the footsteps of Rousseau's 'social contract' doctrine. Rather it crystallizes a consensus among citizens as to the nature and character of their polity and governance. No doubt, this too is a fiction, just as the contract doctrine is, in that it is not a historical fact that citizens sit down and arrive at a consensus on what their Constitution should be. Yet it is a better fiction because it gives the Constitution greater legitimacy and stronger immutability. It raises the issue as to how and through what mechanisms – for example, Constitutional commissions, constituent assemblies or referenda – such a consensus may be arrived at.

In the same speech, the Justice made another important observation. He endorsed the view that the Articles of Union of Tanganyika and Zanzibar of 1964 have a Constitutional status and actually the Constitution of the Union. Professor Shivji first put this position forward in 1990 in his professorial inaugural lecture. The former Chief justice Nyalali also in an extra-judicial speech endorsed the position.²³ But unlike Judge Nyalali, Justice Samatta went further and argued that where there is a conflict between the Articles and the Union Constitution, the former prevail. Neither of these positions has been accepted judicially. The closest that the courts have come is to accept that the Articles still have

21. See the Public lecture delivered by Justice Samatta at Ruaha University College, Iringa, on November 25, 2010, *infra*

22. 'Katiba ya Jamhuri ya Muungano ya 1977', paper presented to Members of Parliament, Dodoma 21st November 2000, reprinted in *Mtanzania* 24, 25 and 26 November 2000.

23. Nyalali, Francis, 1990, 'Katiba na Sheria za Nchi ...' mimeo.

force of law.²⁴ What has hitherto appeared like an academic debate has increasingly acquired political significance with the Union controversy emerging once again in recent public debates. This is no place to go into details on the question except to draw attention to political and judicial establishment to Judge Samatta's speech which has otherwise gone unnoticed. We now turn to another great passion of the Judge and that has to do with access to justice.

Access to Justice

The doors of justice should be opened to all regardless of their station in life or their economic position. This is the position that Justice Samatta held very dear. Hence his unambiguous stand on the right of every one, including those who cannot afford lawyers, to legal representation. While appreciating the work done by voluntary organizations in providing legal aid to indigents, he advocated that 'legal aid should be the right of every poor person and a Constitutional obligation of the government.' (Samatta 2003, p. 4). In the same vein, the Justice reverted and reiterated in his decisions that technicalities ought not to be used to subvert the course of justice and or shut out hearing deserving litigants. He believed in the rule of law and not the 'tyranny of rules.' For him the essential core in the concept of rule of law was 'justice' for, narrowly cast, there can be rule of law without there being justice. Even more important, he emphasized that it is the law that ought to rule and not the rulers who rule law: 'Have the courage to say no to those in society who wish to rule the law.'²⁵ In a situation where the perception of executive interference with the judiciary looms large this is a courageous and daring position to take for the highest judicial officer. Coupled with personal integrity, stature and necessary judicial candor, Justice Samatta's position was undoubtedly respected and appreciated, though his decorum sometimes prevented him from taking proactive positions on fundamental issues.

Ethics, Integrity and Professionalism

In any discipline, profession or line of work there are certain known norms on values, principles or moral codes that must be complied with by those in the discipline, profession or that line of work.

Adherence to ethical principles in any profession is one of the most fundamental means of earning the respect of the public. Justice Samatta

24. See the case of *Mtumwa Saidi Haji & 49 Others v. The Attorney General*, High Court of Tanzania at Dar-es- Salaam Civil Case No. 2 of 1995, (unreported).

25. Speech at the 24th Admission Ceremony of Advocates of the High Court of Tanzania and Courts Subordinate thereto, 15th December 2005.

on numerous occasions reminded members of the legal profession, advocates, judges and magistrates, to adhere to ethics and perform their tasks with the highest level of integrity. To young lawyers joining the Bar, Justice Samatta kept reminding that one of the most fundamental requirements of any person vying to join the legal profession was the need to conform to ethics and have integrity of the highest order.

The former Chief Justice also often reminded members of the judiciary, when the occasions arose, of the need to adhere to ethics. In his speech during the launch of a book for Primary Court Magistrates sometime in 2001, he provided benchmarks for Magistrates. He noted that the entertainment of delays in the provision of justice gives a bad image to the institution of the judiciary in general and to Magistrates in particular. Justice Samatta emphasized on the need for magistrates to be trustworthy, hardworking and brave. He also noted that integrity required magistrates to be human and knowledgeable in the law.²⁶ The former Chief Justice often quoted from Mwalimu Nyerere that 'There are some jobs in our society that can be done by unethical people. People whose ethics can be put to question. Being a judge or magistrate is not one of these jobs...'

Environmental Law

Justice Samatta was also ahead of his peers in advocating for judicial intervention in matters of protecting the environment. The need to address environmental concerns through the judiciary had long picked up momentum at the international level when Tanzania was still grappling with enacting a framework legislation for environmental law. There had been some occasions when the judiciary (High Court and Court of Appeal) had to determine cases, which had a bearing on environmental rights prior to the enactment of the Environmental Management Act, 2004. Whereas, it must be admitted that the judiciary made every effort to develop the jurisprudence of environmental law, there were a number of stumbling blocs. The legislative regime was inadequate and legal counsel was assisting the Bench with leading precedents.

In his characteristic manner, Justice Samatta used the Law Day sessions to emphasize the importance of the growing concerns on environmental degradation and the place of the legal profession in addressing this vice. During the Law Day session held on 2nd February

26. Launch of *Kitabu cha Kiada kwa Mahakimu wa Mahakama za Mwanzo*, Catholic Church, *Tume ya Haki na Amani*, Dar-es-Salaam, 2001 – and opening of seminar for Primary Court Magistrates (4th May 2001)

2004, at the High Court, Dar-es-Salaam, the Justice noted that the state of environmental degradation in Tanzania is not unique. He called upon local and central government to take up litigation in the interest of environment and emphasized the duty of the legal profession to assist courts in this matter.

Justice Samatta drew attention to the problem of strict and conservative approaches to *locus standi* in environmental litigation. Indeed, *locus standi* has, for quite a while, served as a major barrier to environmental litigation in a number of jurisdictions. The problem has, to some extent, been addressed by a number of precedents in many Commonwealth jurisdictions. The Tanzanian High Court too has dealt with this issue through the mechanism of representative suits.

More often than not, the people who are often adversely affected by environmental degradation are those with limited ability to engage the services of lawyers to institute court action against transgressors. Legal fees are often too prohibitive to many of those affected by environmental degradation. On the other side of the coin, as rightly pointed out by Justice Samatta, there is the aspect of Court fees. These have increasingly been high and not within the reach of most of the people, in general and those who are affected by environmental dilapidation, in particular.

Other problems and challenges faced in environment litigation are some of the same ones that are faced in ordinary litigation. Among others, these are procedural technicalities, accessibility of courts to ordinary people, unfriendly nature of the courts and court proceedings and increasingly complex issues arising in environmental litigation.

In a speech to fellow Judges, Justice Samatta summed up his concern for environment and environment justice thus:

The vulnerability of our planet has reached such a depressing degree that there is no greater services judges can render to mankind than playing their role in the protection of the environment and thereby assuring the people the enjoyment of the freedom from fear and danger.

Conclusion

In concluding this brief introduction to the book, which is only a glimpse into the illustrious life of the former Chief Justice of Tanzania, Barnabas Samatta, we can do no better than quote from his own farewell speech.

[O]ne renowned writer is on record to have expressed the view that life begins after retirement. In my view it is difficult to accept that assertion. The truth seems to be that retirement is a road to reach a different destination. I will certainly miss my life as a judge. Fighting against injustice and oppression is a mission that I have thoroughly

enjoyed during my professional journey. I am, however, very hopeful that the Almighty God will enable me to enjoy my active retirement, too. Leonard da Vinci, the famous Italian painter and sculptor, said about five hundred years ago that just as iron rusts from disuse, even so does inaction spoil the intellect. I will constantly remind myself of these very wise words during my retirement life. I wish everyone in the legal sector greater successes in future. Let everyone in our society give justice a chance to prevail.

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PART II

Justice Samatta's Life Journey

Hamudi Majamba

This least harmful organ of the State must not weaken its resolve to protect the weak against the oppression or tyranny of the strong and the ruthless. Those exercising State power must never be left in doubt that transgression of the people's basic rights will be met by the fury of the law. (Farewell speech delivered by Justice Samatta, on the occasion of his retirement, on 19th July, 2007, at the Court of Appeal grounds in Dar-es-Salaam, *infra*)

Introduction

This part provides a succinct account of the biography of Justice Samatta's judicial career. In particular, it traces the foundations of his judicious approach to personal life. It provides some highlights of his early childhood from informal to formal education delving upon some of the issues or circumstances that may have influenced his career path. Some of the challenges that he encountered in this journey and during his career are also explored. The information contained in this part has been extracted mainly from information obtained from Justice Samatta himself. In some cases, however, the information was obtained from his close associates and other sources.

Memoirs of Informal Education

Justice Barnabas Albert Samatta was born in Ng'ombo village in Mbinga District on 20th July 1940. Mbinga is one of the five districts of the Ruvuma Region located in southern Tanzania. Mbinga's neighbour to the North is Iringa Region and to its East the Songea Rural and Songea Urban Districts. To the South, Mbinga District shares a border with Mozambique and to the West with Malawi in Lake Nyasa, Mbinga District under the colonial regime was relatively remote and unknown.

Justice Samatta's parents, Mwalimu Cuthbert Samatta and Mary Julia Kayuza were a teacher and housewife, respectively. The Justice is the last born in a family of five, (three brothers and a sister). His eldest maternal uncle, Mwalimu Charles Kayuza, a teacher by profession, took the responsibility of raising young Samatta after the death of his father when young Samatta was only nine years old. The uncle's young brothers, Mwalimu Barnabas Kayuza and Mwalimu Julius Kayuza assisted him in discharging that responsibility. Mwalimu Charles Kayuza often played a direct role in resolving disputes amongst the villagers at the village level. According to Justice Samatta, the uncle was an old hand at this trade. He was a devout man and a great believer in fairness and orderliness. It is therefore not surprising that the late Mwalimu Charles Kayuza was one of the earliest inspirational figures of young Samatta and who played some role in determining young Samatta's career path.

Like most youngsters who grew up in a typical African village set-up, Justice Samatta adored playing football. Aside from his love of football, he occasionally spent some time swimming and fishing in Lake Nyasa and some of the big rivers that flowed into it. He also took part in the Mganda dance, a popular traditional dance that traces its origin in military drill, common in Ruvuma region, Mozambique, Zambia

and Malawi, Tanzania's neighbours to the south.²⁷ The adoration for the traditional dance may explain the serious and intimidating looks that some acquaintances and other people have associated with him.²⁸

According to the Justice, one of the major challenges he faced during his childhood was the threat of crocodiles in Lake Nyasa and the big rivers. During the rainy season, Justice Samatta recalls lions roaming the village at night, leading to most villagers retiring early to bed. He notes that he had to take extra care when swimming, crossing rivers or fishing. Also, due to the caution taken to avoid the African jungle there were no casualties. Little did the young Samatta know that the challenges posed by the crocodiles and lions would re-emerge, in a somehow different version, but requiring a much similar form of courage, caution and calculation, in the course of his judicial career.²⁹

Although he does not explicitly state so, Justice Samatta is also a devout person. Some of his most memorable moments during childhood and his conduct during adult life attest to this. The influence of religion on his up-brining is reflected in what he describes as the honour accorded to him by the Head teacher of his primary school to read a lesson at a Sunday church service when he was in standard four. The arrival and day of a bishop in his village and the accompanying excitement, including when bishops of British nationality preached in church in local vernacular, during his childhood are recollections that he still treasures. The devotion that the Justice has for faith and its intrinsic relationship with justice is exemplified in a case he considers as one his most memorable ones as Chief Justice. The observation in *Dibagula's* case, which centered on the limits, if any, on the rights of freedom of religion guaranteed by the Constitution of the United Republic of Tanzania attests to this assertion. Justice Samatta, stated, *inter alia* that:

The freedom to transmit or spread one's religion or to proselytize has to be exercised reasonably, that is to say, in a manner which recognizes the rights, including religious rights, of other persons. It must be exercised

27. For more information on the origin of this dance, see: <http://wwwbridgewater.edu/mtembo/mugandadance.html>-(Accessed 22nd September 2010).

28. See Judge Warioba's note on how he remembers the retired Chief Justice.

29. Justice Samatta says that one of the most challenging moments he confronted in the course of administration of justice was dealing with allegations of corruption against senior judicial officers. Madam Justice Eusebio Munuo of the Court of Appeal of Tanzania also observes that Justice Samatta did not tolerate corrupt judicial officers. As noted below, at one time while he was Principle Judge, Justice Samatta contemplated resigning after the government ignored a directive that he issued in a formal court setting.

in a manner which demonstrates respect for the freedoms of persons belonging to other religions, atheists and agnostics.

Outside his boy-hood hobbies, Justice Samatta took a keen interest in following up the dispute resolution mechanisms at his village. Together with the influence from his maternal uncle, young Samatta's interest in the dispute resolution process was also driven by the skills exhibited by the Jumbe and village elders examining witnesses and their command of the local language in the course of resolving disputes. The Justice admits that to a great extent, this early childhood experience played some role in influencing his decision to read law.

The Terrain of Formal Education

Justice Samatta's formal education started when he was ten years old when he joined standard one at Ng'ombo Primary School near Mbamba Bay. The decision by the Head teacher of the school to elevate young Samatta to standard three, effectively spending only two months in standard two had three main effects, according to Justice Samatta. First, it enabled him to complete primary education a year earlier. Secondly, he was greatly inspired in his yearn for knowledge. He also admits that the elevation also boosted his confidence enormously.

His family's rather unfortunate relative state of poverty almost condemned the inspirational young Samatta to a peasantry lifestyle. This happened upon successful completion of his primary schooling and having been selected to join St. Paul's College, a Middle School run by the Anglican Church located at a place called Liuli in the present Mbinga District, which was then a part of Mbinga District. This school raised the fees to a level that young Samatta's family could not afford. The family, however, struggled and managed to secure an alternative affordable school, Kilosa Native Authority School, also near Mbamba Bay, which was actually almost three times cheaper and closer to Ng'ombo village. This was in 1953.

Young Samatta's stint at Kilosa Native Authority School was short-lived. After only about two months he was discontinued and sent home. The expulsion was not as a result of the militancy of leadership of student strikes as is common with most expulsions from institutions of learning. This expulsion was a result of the findings of a routine inspection by the District authorities from Songea to Kilosa Native Authority School. It emerged that the young Samatta had not attended the school that he had been selected to attend (St. Paul's College) and his class there had already been full. The light at the end of the tunnel for Justice Samatta's

educational journey was fortunately re-kindled when the Provincial Educational authorities reversed the District authorities' decision a month later.

After the hiccups in the rather rough and winding terrain to his educational path, young Samatta eventually completed standard six in 1954. Between 1955 and 1956, he studied at Songea Boys Secondary School before moving to Tabora Boys Secondary School in 1957 where he completed his secondary school education in 1962. Justice Samatta's early exposure to assuming responsibilities commenced at Tabora Boys Secondary School where he was a prefect of Lacy House.

Justice Samatta's favourite subjects during his primary and secondary education schooling were predominately science related, including Mathematics. English and History were also subjects that he was fond of. During his free time at schools, Justice Samatta continued his leisure pursuit for fishing and playing football. He also picked up hockey and basketball. His participation in debates at this level could be construed as revealing some element of perseverance in engaging in constructive dialogue and respect for diverse opinions. Apparently, Justice Samatta sought to maintain these traits. This is evidenced with his recollection of a time when someone tried to persuade him to cross over to a different Ministry (but still continue practicing law) and relinquish the position of State Attorney. He rejected the offer, preferring, in his own words: *'a career that involved courtroom battles'*. He further developed these traits in the course of his judicial career as stated by some prominent Justices and acquaintances.

Mr. John Crabbe, one time Headmaster of Tabora Boys Secondary School, is one of the teachers who played a major role in imparting knowledge to Justice Samatta. The Justice observes that the late Crabbe was a special role model for him and one of the most inspiring educators and very able and dedicated school administrator; Justice Munuo of the Court of Appeal of Tanzania sees the educator and administrator characteristics in Justice Samatta himself.

A strong believer in equality, partly grounded in his admiration of the fairness meted out by local village elders in the course of resolving disputes amongst villagers during his childhood, Justice Samatta came face to face with the harsh realities of discrimination after completing standard XII (which is now the equivalent of Form IV). In 1960 he, with a group of other colleagues, secured temporary jobs at the Mwaui Diamonds Mine located near Shinyanga region. At that time, the renowned De Beers of South Africa operated the Mine. For

the orientation tour of the premises, Justice Samatta was assigned to a white man to familiarize him with the workplace's surroundings. The tour guide showed him a toilet that was to be used by him and fellow Africans with strict instructions not to attempt to use any other toilets on the premises. Justice Samatta laments that he felt very humiliated as he recalls the prevailing racial relations in his first experience of paid employment. He states that Africans were considered of an inferior class, placed at the periphery after Indians and Europeans, irrespective of educational qualification.

Justice Samatta's second employment experience came in 1962 when he was attached to the Mtwara District Court pending joining the Faculty of Law of the University College of Dar-es-Salaam, (now the University of Dar-es-Salaam School of Law, formerly Faculty of Law of the University of Dar-es-Salaam). It was during this six-month attachment that Justice Samatta acquired knowledge and experience that proved useful to his legal career. During his stint at the Mtwara District Court, Justice Samatta was privileged to meet Mr. Justice Spry, a renowned judge and Mr. Herbert Chitepo, a Southern Rhodesian, who was the first African Director of Public Prosecutions in Tanganyika.

Justice Samatta's childhood dream of studying law commenced as a freshman at the University College of Dar-es-Salaam in 1963. His favourite subjects over the years at the College were Criminal Law, Constitutional Law and Administrative Law. His role model in the course of studying law was Prof. James Read who taught his class criminal law. Justice Samatta's academic performance was superb, leading to him being awarded the University College Principal's First prize for 1963/1964.

Justice Samatta also took part in Student Government while at College. He was elected Speaker of the students' Parliament of the University. It is during his tenure as Speaker that he exhibited his capacity to take command of difficult situations and bring about a tranquil atmosphere without ruffling feathers. This happened when the student government resigned and he took charge of the government in accordance with the Constitution of the Student's Organization. As the driving force as the Caretaker he managed student's affairs single-handedly. These responsibilities included resolving disputes and overcoming challenges from students who wanted to take over leadership of the Organization.³⁰

30. See Judge Warioba's recollection of the times spent with Justice Samatta during this era below.

When the tide had subsided, Justice Samatta organized elections and handed over the Organization to a newly elected government in accordance with the laid down procedure in the Students' Government Constitution. The College Principal, Dr. W.K. Chagula, wrote a letter to congratulate Justice Samatta personally for very ably handling the Student Government 'under circumstances which could only be described as difficult and trying' – indeed trying because other people with such an opportunity would have made every attempt to cling onto power. For Justice Samatta, one of his most memorable moments during College days was handing over the Student Government to a new Student Government on 1st November 1965.

In 1963, while in the 2nd year at the College, Justice Samatta was awarded a scholarship, with two other classmates, to attend the School of Oriental and African Studies (SOAS) in London where he studied African Customary Law for three months.

Justice Samatta's first fulltime employment after completion of College was at the Attorney General's Chambers in Dar-es-Salaam where he was employed as a State Attorney. He joined the Chambers on 5th April 1966, on the same day with Judge Warioba and rose through ranks. In September 1967, Justice Samatta was nominated as legal consultant and formed part of the delegation to the three-month session of the United Nations General Assembly in New York. He was an Assistant Legal Advisor to the delegation, assisting Mr. Seaton and also represented Tanzania in the Legal Committee of the Assembly during this stint. This event widened his base as he met and rubbed shoulders with prominent international jurists. Ten years after the New York accomplishment, Justice Samatta was awarded honorary life membership in the Wilshire Bar Association based in the United States of America. On October 1968, he married Mercy Gladys Simba; they have four children: Jane, Peter, Doris and Talumba.

Between 1971 and 1972, Justice Samatta was promoted to the position of Senior State Attorney. He thereafter rose to become the Director of Public Prosecutions for Tanzania Mainland, a post he held from 1972-1976 when he was appointed Judge of the High Court of Tanzania.

Justice Samatta's exposure to practical aspects at the international legal arena that had commenced during the United Nations General Assembly in 1967 was boosted during his career at the Bench when he served as Judge of the High Court of Zimbabwe between 1984 and 1987. It was during the three year stay in the High Court of Zimbabwe that Justice Samatta obtained an in-depth exposure to Roman Dutch law.

He returned from Harare and resumed his responsibilities as Judge of the High Court of Tanzania in 1987. Two years later, Justice Samatta was appointed Principal Judge of the High Court of Tanzania. While in this position, he played a great role in determining the conduct of legal practitioners when he chaired the Advocates Committee and the Council of Legal Education.

Justice Samatta's determination in ensuring that the judiciary remained independent from the Executive arm of government was put to serious test when he was Principal Judge. At one time, he was pushed to the brink and seriously contemplated resigning from the office of Principal Judge. This was after he had issued a temporary injunction restraining the government from deporting two German nationals pending the hearing of their case. The government (through the then Prime Minister) ordered the relevant officials to ignore the order. The applicants were deported. Justice Samatta states that after serious soul searching, he decided not to resign, in order not to give an opportunity to the then Prime Minister to lobby for his replacement with a timorous soul. According to him, the then Chief Justice's timely and judicious intervention also assisted in cooling off the otherwise dangerous high tide.

Despite such odd encounters with government, Justice Samatta still recollects memories of the government's collaboration in improving the legal sector in the country. He states that one of his most cherished moments was when the government accepted the recommendations of a Task Force of which he was a member. The major recommendations advanced by the Task Force included the creation of department of the Director of Public Prosecutions nationwide, the civilization of the prosecution system and the establishment of a Law School in the country. These recommendations have now moved from the drawing board and are at different levels in the operationalization process. Indeed these are areas that had a negative effect on the administration of justice in general and had long plagued the performance of the judiciary in particular, and often tarnished its image in the eyes of the public.

His advice for those contemplating to join the judiciary is that they should be the kind of persons who are able to demonstrate boldness and a high degree of independence. He warns that: 'the judiciary is neither a place for timid souls nor is it a place for lazy persons.'

In 2000, Justice Samatta was appointed the Chief Justice of the United Republic of Tanzania, a position he held until he retired from government service on 20th July 2007. He delivered a number of important

decisions and paved way for the present and coming generations in the administration of quality justice for the country's legal system.

Justice Samatta also played a dynamic role in other activities that had a bearing on improving the administration of justice in the country. Between 1989 and 2000, he was a member of the Judicial Service Commission, which is charged with, among other things, appointing judicial officers and regulating their conduct. Between 1974 and 1977, he was a member of the Judicial System Review Commission (a body appointed by the President to review the legal sector in the country and recommend measures to improve its performance- this Task Force is commonly referred to as the Msekwa Commission). Between 1993-1996 he was a member of the Legal Task Force- Tanzania Financial and Legal Management Upgrading Project – (the Task Force was charged with making an in depth study and recommendations on how to improve the legal sector in Tanzania Mainland and Zanzibar). From 2000 to 2007 he was the Chairman of the Judicial Service Commission.

Since 2000, Justice Samatta has been a member of the Judicial Integrity Group, an independent international body comprising of six Chief Justices and two senior judges, which adopted the Bangalore Principles of Judicial Conduct. This team comprises of prominent jurists worldwide. Judge C.G. Weeramantry who is the former Vice President of the International Court of Justice chairs it. In the same year, he was also the Vice Chairman of the Appointments Committee. In 2003, he was elected Vice Chairman of the Southern African Judges Commission whose membership consists of Chief Justices of the Region.

When he reflects back on his career on the Bench, Justice Samatta has some word of advice not only for those in the judiciary charged with the task of writing judgments but also for those engaged in legal writing and drafting of the law. In fact he also provides food for thought for the law teacher and some relief to the first year student grappling with comprehending the language of the law when he states lucidly that:

I would prepare my judgments in a simpler language; avoiding legal jargon as much as possible. I would be more inclined to adopt unconventional writing style. Demystification of law would be one of my primary aims.

Justice Samatta still has a lot of respect for all colleagues and people he worked with who were truthful in the course of his judicial career. He maintains that he has a long list of role models for up-coming generations of practitioners. From among the list, those that he singles out as exemplary include the late Chief Justice Georges, Mr. Justice Kisanga and the late Mr. Justice Lugakingira.

Retirement life for Justice Samatta comprises of a semi-mixed grill. He now spends more time with his family of four children and five grandchildren. He also gets time to read autobiographies, biographies and updating himself on various issues on African affairs. Occasionally, he reminds himself of the youthful time while growing up in the village by engaging in farming.

On the public front in his retirement, Justice Samatta performs his duties as Chancellor of Mzumbe University, a public university located near Morogoro. The President of the United Republic appointed him to this post. At the international front, Justice Samatta has continued to be an active member of the International Judicial Integrity Group. He has been invited to various international and national forums to deliver speeches and present papers on topical issues in the administration of justice.

PART THREE

How I Remember Justice Samatta

Justice Samatta has been a bastion of integrity. He is totally incorruptible in every sense of the word. He is a fervent believer in the rule of law and justice and he struggled all the time in his professional life to balance the two.

Judge Warioba

Introduction

Justice Samatta has travelled a long path in his career as a lawyer and a Judge. He has also had a social lifestyle. In the course of all these endeavours Justice Samatta has made many friends and acquaintances. A number of people have shared some important moments in the life of Justice Samatta. This part of the book provides some highlights on the Justice from a sample of his contemporaries and colleagues that we approached and who responded.

The highlights capture some comparable salient and memorable insights on the academic, professional and social lifestyles of Justice Samatta.

Hon. B. A. Samatta - A Model of Justice

*Engera Kileo*³¹

I first worked very closely with Hon. B. A. Samatta between 1993 and 1997 when I was the Registrar of the High Court of Tanzania. He was the Principal Judge. He is a very bold and principled man. He is a great defender of the Rule of Law and Independence of the Judiciary. He practises what he preaches. He is a very fair person who never condemns any one unheard, whether in his administrative or judicial capacity.

I was appointed Judge of the High Court on the same day that he was appointed Justice of Appeal. I remember how happy both of us were as we congratulated each other for being elevated to our respective positions. Hon. Samatta cares deeply for the interests of others. I remember that before he endorsed my transfer to the Land Division of the High Court he first called me at Dodoma (knowing that I was just settling in, and in fact loving Dodoma) and asked me whether I would be comfortable being transferred to Dar-es-Salaam to take charge of the newly formed Land Division of the High Court of Tanzania. I was deeply touched and thought that was very kind and considerate of him.

As a judge in charge of the Land Division of the High Court, I sometimes used to sit in on briefings that he gave as a Chief Justice to the Registrars or Deputy Registrars who were posted to the Land Division. He was very organized and systematic in his briefings. He always used to emphasize on administration by correspondence, stressing on the importance of responding to correspondence addressed to us

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(as judicial officers dealing with administrative matters) with promptness. He loathed seeing people coming all the way from up-country to follow up on matters that could have simply been dealt with through efficient correspondence. He was both time and cost conscious. In today's circumstances I believe he would have emphasized e-correspondence.

During his briefing, Justice Samatta always underscored the value of integrity. I remember he used to tell us that it is better to have a magistrate who is not very well versed in the law but whose integrity is above reproach rather than having one who is very well versed in the law but who twists it and distorts justice for his own gain. To him fairness and being firm in decision making had to go hand in hand. He always respected the other person's point of view and required us to do the same. I remember a phrase he often used to refer to. Although I do not recall the exact words he would say, but it was something like: *"I may not agree with what you are saying, but I will defend to death your right to say what you believe in."*

Mr. Justice Samatta is a great lover and preserver of the environment. He is the initiator of *"Tamko la Morogoro"* (Morogoro Declaration) that places emphasis on the need to keep court premises and their environments in such a way that the dignity of the Judiciary is maintained. He encouraged the growing of trees, flowers and grass around court premises. During his tenure, court premises got major face-lifts. In fact, in some townships where there was competition in the area of maintaining good environments for the work premises such as Arusha, the Judiciary won awards. The retired Chief Justice believed that the appearance of court premises as well as dispensation of justice played a role in giving confidence to the citizens on their perception of the Judiciary.

On the social side, Mr. Justice Samatta is humble, kind and considerate. He has a terrific sense of humour. I thank God for the privilege of having worked under him.

The Samatta I Know

*Joseph Sindi Warioba*³²

One day someone approached me and said he wished to have a word with Chief Justice Samatta. “But the man always wears a serious and intimidating look and I am rather scared to accost him,” he said. I jokingly told him that “the Chief Justice is an elephant and you are one blind man who has touched a part and you think it is the whole elephant.”

I have known Judge Barnabas Albert Samatta for almost fifty years. We met at Tabora Secondary School in 1961. We joined the University of East Africa, Dar es Salaam Campus (Dar es salaam University College) in 1963. We joined the Attorney General’s Chambers on the same day, April 5, 1966. We rose through the ranks and Samatta became Director of Public Prosecutions and I became Attorney General.

B.A, as we who were close called him, is a man of compartments. In class he listened keenly and with a lot of attention. He captured the essence of the lesson or lecture. At leisure time he was completely relaxed and enjoyed whatever was in front of him with complete abandon. He was jovial and jocular. At one time at Tabora School he played the role of Mac Beth in a drama production. He looked so serious and intimidating one would have thought he was the real Mac Beth!

At another time when we were at the University he became the Speaker of the House of Representatives of the Students’ Union. We then had the habit of installing leaders and then toppling them. We toppled

32. Judge Warioba served in different capacities in the government of the United Republic of Tanzania: Prime Minister, Attorney General and Minister for Justice. He also served as Judge at the International Tribunal of the Law of the Sea from 1996-1999. Between 2001 and 2006 he served as a Judge of the East African Court of Justice.

the President and the Speaker acted as President during the interim. Efforts to topple him failed miserably. He was keen and forceful. We used all the rules and tricks to try and topple him and he used the same rules and defeated us at every turn.

At the end of the debate in the student union or lecture for that matter, we would go to our watering hole at *Yenu* Bar located not far from the University, at Ubungo. B. A. would be relaxed and joking with all, even those who had constantly but plotted the abortive coups. He would jokingly impose a “fine” if one did not order the “correct” drink. It was great fun.

At work in the Attorney General’s Chambers, B.A behaved in a similar fashion. As young prosecutors we used to prepare very carefully for court appearance, including holding sessions or conferences where some would act as devils’ advocates. B.A. was good at this. Prior to appearing before a judge he would master all the issues in the case, including what constituted exonerating circumstances. As DPP he made sure those under him did the same. As a judge he performed his duties with utter seriousness and at leisure time he was the same relaxed and jovial B.A.

B.A. has maintained his life by focusing on the things he is doing at that particular time. At work he concentrated all his faculties to the issue before him. He would look serious and sometimes intimidating but would fundamentally transform thereafter, or during the breaks. Those who saw him at study sessions or at work would think he is a “wooden” man. Those who socialized with him at leisure time certainly enjoyed his jokes. He is an elephant among blind men.

On a serious note, Justice Samatta is a brilliant individual. He performed very well at school and university and he distinguished himself in his professional life. He rose to the utmost peak in his profession and as Chief Justice he was head of one of the three pillars of the State. However, he still remained humble and ordinary. He has never been a show-off. Justice Samatta is a very moral man and also a man of proper etiquette. He is neither mean nor a lavish spender. He has always dressed well according to the occasion but avoided extravagance.

Justice Samatta has been a bastion of integrity. He is totally incorruptible in every sense of the word. He is a fervent believer in the rule of law and justice and he struggled all the time in his professional life to balance the two. Justice Samatta is a person of commitment. He has served his country with total commitment and in the process he distinguished himself as a true leader of people. But all the same he remained a very ordinary individual. I do not know many people of his caliber.

How I Remember Retired Chief Justice Barnabas Samatta

*Eusebio Nicholas Munuo [Mrs.]*³³

The retired learned Chief Justice is an icon of human dignity and respect. Whether in office or out of office, he maintains a confident aura, all the time portraying decorum and peace. Few people fit into this description. The learned Retired Chief Justice is a free citizen of a free country with a clean record of peace and stability in the human race. In this regard, the learned retired Chief Justice reflects the pride of patriotic senior citizens of this nation, who have ardently and vigorously safeguarded national unity, peace, good governance and the rule of law. Samatta is a legal luminary of the noble profession of law. He is a dedicated national leader of great magnanimity.

Mr. Justice Barnabas Albert Samatta honorably relinquished the office of Chief Justice. However, as his intellectual abilities are still on high demand, he was appointed by the President of the United Republic of Tanzania to be the Chancellor of Mzumbe University located at Morogoro. Hence, he will continue to disseminate legal knowledge, skill and expertise, this time not in the courts, but in the academic forum. Law students, professors, administrators and the younger generation will learn from the selflessness, shrewdness, integrity and sense of responsibility of the retired Chief Justice. He invokes natural justice and wisdom in tackling administrative matters. He has an impeccable sense of leadership. The words discrimination, nepotism, abuse of power,

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suppression and arrogance do not feature in the vocabulary or life style of the Retired Chief Justice Samatta. While he fatherly admonished erring judicial officers, he wasted no time dismissing corrupt judicial officers who betrayed the cause of justice provided the charges of soliciting or receiving bribery were substantiated beyond all reasonable doubt. The learned Chief Justice had no problem with faithful, truthful, honest and hard working staff.

The learned Retired Chief Justice Samatta advocated and practiced the Independence of the Judiciary. I have been serving the Judiciary of Tanzania since 1970. To date I have not come across a judicial officer complaining that the Retired Chief Justice interfered with a matter before him except for purposes of revision, appeal or some other judicial function allowed by law. Authorities who go out of their way to influence decisions have one disadvantage: the victims will often spread word around. Like many other judicial officers who served under Mr. Justice Samatta, I certify that he complied with the oath of office he took; he complied with the provisions of the Constitution and the laws of the land. He observed the spirit and letter of the Independence of the Judiciary and challenged magistrates and judges to decide cases on the facts, issues, evidence and the law impartially, without fear or favour.

The learned Retired Chief Justice is tolerant and patient. Judges sometimes differ during panel discussions. Where a member of a panel dissented, he left no stone unturned and by further discussing the matter the dissenting opinion would indeed, after a thorough deliberation, be the decision of the Court or remain a dissenting judgment. Just as a farmer tills the ground and harrows the field before sowing seeds, pleadings, facts, evidence, and authorities have to be sorted out, sifted, exhaustively scrutinized, edited and re-edited to the satisfaction of the panel before issuing the decision of the Court. The process would be done with a cool and settled mind and under no pressure whatsoever regardless of how complex or involved the case was.

It is difficult to write about the outstanding and excelling performance of Retired Chief Justice Samatta. Even when stressed with judicial activities, he remained composed and systematic, he left nothing to chance. He was an exemplary judicial officer by any standard. He administered quality justice for this and for future generations.

With the above in mind, and like all others who wish him well, I also take this opportunity to wish the Retired Chief Justice a blessed happy life with his wife Mercy, and their children.

Recollections on Justice Samatta

*Justice Robert Kisanga*³⁴

It was an honour and privilege for me to be asked by the editors of this book to say something on how I remember Justice Samatta, Chief Justice now in his retirement. Let me say at once though that although I am delighted in this respect I find the task to be quite challenging. There is so much to be said about the man that it is not easy to decide what to say and what not to say. Justice Samatta and I met for the first time in 1966 in the Attorney-General's Chambers, Dar es Salaam where both of us were employed as State Attorneys. Although we did not attend the same institution for our law studies, it did not take long to make us acquaintances and subsequently close friends and colleagues. As a colleague Samatta is remembered for his great sense of humour, respect for others, his hard work and his readiness to co-operate with others and to render advice.

I remember Samatta as having set a good example of a lawyer and a judge. His outward appearance said it all. He was smartly dressed and conducted himself with admirable dignity. His love for the legal profession was beyond question, and court room work appeared to have offered greater attraction for him. I remember Samatta for his coolness, composure and use of sober language. He read widely so that he kept himself well informed on matters of general knowledge. He was a good

34. Justice Kisanga retired in 2008 after serving as the First Chairman of the Tanzania Commission for Human Rights and Good Governance. Prior to taking up that role, he was Justice of Appeal at the Court of Appeal in Tanzania, having earlier served as a Judge of the High Court of Tanzania.

writer. His writings, including his judgments and speeches, were well thought out and educative. Not only did Justice Samatta love the legal profession, he was himself a true professional. He respected the ethics of the profession. He was a man of principles who, even when faced with a difficult situation, was not prepared to sacrifice principle for the sake of expediency. Justice Samatta was a great advocate for a fair play in the society where for instance the disadvantaged members such as the poor ought to be afforded equal access to justice.

Justice Samatta is a man of great integrity. In this respect I remember specially his grave concern about corruption. The existence of corruption in the society disturbed him greatly but the existence of it and its continuing to flourish in the Judiciary worried him even more. Judiciary is the last resort for victims of corruption to seek remedy, but if the Judiciary itself is corrupt then the victims are doomed so to speak. I am certain this problem continues to occupy Justice Samatta's mind even in his retirement.

Justice Samatta liked to keep and develop tradition in the Judiciary. Admittedly the Tanzania Judiciary has, so far, only a short list of traditions. These include the bi-annual event of Admission Ceremony of Advocates to the Bar and the annual commemoration of the Law Day in Tanzania. Justice Samatta is remembered for being instrumental to initiating some of the traditions. As Chief Justice and leader of the Judiciary he officiated the occasions of commemorating these events and he is remembered for his valuable speeches on those occasions which served as a useful guide not only to members of the Judiciary but to the legal profession as a whole.

Justice Samatta as Chief Justice and leader of the Judiciary was non partisan. He did not align himself with any group or groups of persons for his administration. His administrative actions were taken independently after due consideration of each case and without being influenced by external pressure or extraneous matters. Closely connected with this is his cool temperament. I remember Samatta as a Judge who could never be made angry or be made to lose his head. Each time one sees or talks to him he is ever cool, smiling and friendly.

Lastly I remember Justice Samatta as having played a significant role in speeding up the process of reforms within the Judiciary in recent years. For a long time since the country's independence the Judiciary went through a period of stagnation when little or nothing was done in the way of improvement. Today, however, there has been a re-thinking about the matter.

Lately steps have been taken and are being taken to try to bring about reforms designed to put the judiciary in its proper place in the society. Justice Samatta is remembered as being one of those who spearheaded and later speeded up the process of reform in the Judiciary. With those few happy memories I wish the Honourable Chief Justice (Rtd.) Barnabas A. Samatta and his family a long and happy life.

B.A. Samatta (As he then was)

*Mohammed Ismail*³⁵

B.A. Samatta – I often told him that his initials should have been C.J. and not B.A. as the former were more fitting and descriptive of the person. Barnabas Albert Samatta crossed my eyes for the first time way back in 1962 – at Tabora Boys School. I only knew him as a person who was one year my senior and a prefect of Lacy House.

I got to be more familiar with Samatta at the University College of Dar es Salaam in 1964 – when I joined the Law Faculty and found him also in the same Faculty in his second year. By then it was clear that Samatta was a “top” student in his class and “a total lawyer,” who spoke law and joked law. If you were not a good law student you might not have appreciated Samatta’s excellent humour.

As a law student he held two prominent posts at the University – one elected and the other merited (earned) or deserving. The elected one was as Speaker of the UCR – University Council of Representatives – the student’s elected Government body. Samatta was an elected Member of Parliament so to speak – and then was elected as Speaker of the House, as it were. Samatta excelled in that office and seemed to get much pleasure in directing UCR Members and distinguishing issues, motions etc. He had an alert legal mind when it came to members speaking out of order or on points that were irrelevant.

The other “post” held by Samatta while he was a student at the Law Faculty was of an organization that did not have a written Constitution, bye-laws or rules. He was the Secretary General of a Society titled “ANTI

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SOBRIETY CLUB.” I have never been fortunate enough to be availed with the Constitution of that organization. No one seemed to know how the members were selected or chosen – yet there was no secret as to who the members were!! A constant number of law undergraduates were regularly observed at the student’s ‘bar’ (alongside the cafeteria) often after library hours (i.e. 10:00p.m.). Serious discussions or debates on points of law were said to take place at these meetings as beer was being consumed.

I was re-united with BA again in Mwanza as a State Attorney in June 1969. This was a different forum – here we were both State Attorneys working for the Attorney General’s Chambers stationed at Mwanza – he of course my senior. Here was a different Samatta, immaculately dressed – the “Charles Njonjo” type of dress – dark suit, tie, and sober coloured shirts. The external appearance was solemn, his performance in the court was professional but he retained his humour. Samatta left Mwanza and after a brief stay at Iringa, he returned to Dar es Salaam to serve in the Attorney General’s Chambers and ultimately was appointed Director of Public Prosecutions. I was transferred to Dar es Salaam and worked under him in the Attorney Generals’ Chambers. If one was fortunate enough to work under Samatta – he or she was forced to appreciate his detail analysis of legal issues and his total commitment and love for his work. I have often felt that Samatta was more comfortable and indeed enjoyed more being Director of Public Prosecutions than a Judge! I stand to be corrected.

The next appointment for Samatta was to be sworn in as a Judge and ultimately the highest post the Judiciary could offer him - the Chief Justice of Tanzania. I felt that although that is the highest post in the legal fraternity, the nation gets robbed of a good legal mind when persons like him have to spend more time in administrative duties than purely judicial work. But that is not the topic for today.

The humour in Samatta, his uprightness and integrity I have yet to see in another Judge. To conclude I will repeat what one of his fellow Judges told me: -

“One day there was a chamber application before a Judge in the High Court in Dar es Salaam. An Advocate who had been on the roll for a long time but had not been appearing in Court as he had been holding high public office appeared in the Judge’s Chambers for the Applicant. When the matter was called, the Advocate stood up to argue the application, much to the embarrassment of the Judge. When the Judge narrated this experience to him, Samatta quipped ‘you (i.e. Judge) should have stood up as well.’”

-Mohamed Ismail.

PART IV

Justice Samatta in His Own Words

Justice Samatta's Leading Judgements at the Bench

IN THE HIGH COURT OF ZIMBABWE

AT HARARE

BARKER McCORMAC (PVT) LTD

Versus

GOVERNMENT OF KENYA

(Samatta J.)

CIVIL CASE 15, 16 OCTOBER 1984 AND 16 JANUARY 1985

Cases Cited:

Barker McCormac (Pvt) Ltd. v. Government of Kenya 1983 (2) RLR 72 (SC);

1983 (4) SA 817 (ZSC).

Inter-Science Research and Development Services (Pty) Ltd. v. Republica Popular de Mocambique 1980 (2) SA 111 (T).

Trendtex Trading Corporation Ltd. v. Central bank of Nigeria [1977] 1 All ER 881 (CA).

Hersch v. Nel 1948 (3) SA 686 (A).

De Jager v. Sisana 1930 AD 71.

De Wet v. Union Government 1934 AD 59.

Creeser v. Smit 1948 (4) SA 302 (T).

Shatala & Anor. V. gelb 1950 (I) SA 851 (C).

Scrooby v. Gordon & Co. 1904 TS 937.

I Congreso del Partido [1981] 1 All ER 1064 (HL).

Alfred Dunhill of London Inc. v. Republic of Cuba et al 425 US 682, 48 L Ed 2d

301, 96 S Ct 1954.

Claim against the Empire of Iran (1963) 45 ILR 57.

I Congreso del Partido [1981] 2 All ER 1092.

Etat Espagnol v. Societe Anonyme de l' Hotel George V (1970) 52 ILR 317.

A P de Bourbon SC for the plaintiff

H P Mkushi for the defendant

SAMATTA J.:

This case raises some interesting points of law relating to the doctrine of sovereign immunity. Before the Second World War nearly all States treated sovereign immunity as being absolute, regardless of the circumstances of the subject matter. Since then, however, many States have abandoned the classical or absolute theory of immunity and embraced the restrictive theory under which immunity is granted only with respect of causes of action arising out of a foreign State's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. Which of these two theories forms part of the law of this country? If it is the restrictive theory, is the defendant's plea of jurisdictional immunity sustainable in law? The case, I am happy to say, has been so admirably argued that I have had all the assistance I am entitled to expect from the Bar. In the course of argument, counsel referred to a large number of authorities. Although I have considered all the cases referred to, I need only make specific reference to some of them.

The facts of the case need not be stated in detail as most of them are set at 1983(1) ZLR 137 and 1983(4) SA 817. They are as follows. In May 1976 the plaintiff and a company known as "Albemarle (Private) Limited" entered into a lease whereby the former leased from the latter a portion of immovable property situated at 95 Park Lane, Harare, hereinafter referred to as "the property". The duration of the lease was five years, but there was a provision granting the plaintiff an option to renew the lease. The provision was couched in the following language:

...the Lessee shall have the option to renew its lease upon the premises for a further period of THREE years after the termination hereof, provided that the Lessee shall exercise its option by written communication addressed to the Lessor at the *domicilium citandi et executandi* referred to in this Agreement by not later than the 31st day of December 1980.

The lease was deemed to have come into force on 1 April 1976, when the plaintiff occupied the premises in question. In or about May 1980 the Government of Kenya (the defendant), a foreign sovereign government, bought the property for the purpose of using it as its High Commission in Zimbabwe. The plaintiff continued occupying the leased premises until September 1982, when it unwillingly moved out. Between May 1980 and November 1981 it paid rentals to Fox & Carney (Pvt) Ltd, a

company appointed by the defendant as its agent. On 30 October 1981, however, the defendant's attorneys wrote to the plaintiff's attorneys in the following terms:

We have been instructed by our Client that henceforward, all rentals due by your Client, which rentals are received without prejudice by our Client, should be paid direct to our Client for the attention of Mr. W.K. Karisa, and not to Fox and Carney...

Furthermore, we would advise that any complaints or queries from your Client relating to their occupancy of the building should be directed to our Client, once again for the attention of Mr. Karisa.

The defendant's attorneys had, on 29 May 1980, written to the plaintiff in the following terms:

We refer to the recent discussion at your offices with the writer and Mr. Adala, representing the Government of Kenya. The property known as Barker McCormac House is about to be transferred to the Government of the Republic of Kenya who has requested us to confirm that on completion of the period of your lease you will not be exercising the right of renewal thereof as verbally confirmed to us at our said interview. Notwithstanding the above the Kenyan Government has indicated that it may be prepared to re-negotiate the lease with you once it has assessed its own requirements with regard to office/floor space.

In its reply the plaintiff denied that an undertaking that it was not going to exercise the option of renewal had been made. On 2 October 1980, it formally informed Albemarle (Pvt) Ltd., as well as the defendant, that it wished to renew the lease, but the defendant would not allow it to continue occupying the leased premises. In September 1982, after failing to persuade the defendant to change its mind, the plaintiff vacated the premises and leased other premises in the city at a higher rental. About four months later it commenced civil proceedings against the defendant before this court to recover the sum of \$55,691,35, being the difference in the rental. When the Sheriff attempted to serve the summons and declaration, an official of the defendant's High Commission refused to accept the service and would not allow the Sheriff to enter the premises. The plaintiff was not to be deterred by this development in its quest for justice. It applied, under O 6 R 46 of the High Court of Zimbabwe Rules, 1971, for substituted service by affixing the summons and declaration to the gate of the High Commission. Following an order made by McNALLY J. (as he then was), the application was set down for hearing. It was heard by WADDINGTON J. (as the then was). The learned

Judge dismissed it, holding *inter alia*, that, assuming that the restrictive doctrine of sovereign immunity formed part of our law, the purchase of the property by the defendant for the purpose of setting up its High Commission was an act *jure imperii* and, therefore, the defendant could not against its will be made a party to legal proceedings in municipal courts of Zimbabwe. The plaintiff appealed against this decision to the Supreme Court. The appeal was allowed, the Court holding, *inter alia*, that it appeared “at least arguable that on an application of the restrictive doctrine the claim might not be regarded as one in regard to which immunity could successfully be raised”. (See *Barker McCormac (Pvt) Ltd. v. Government of Kenya* 1983 (2) RLR 72 (SC) at 81H; 1983 (4) SA 817 (ZSC) at 823C). Leave was granted to the plaintiff to effect service by the dispatch of copies of the summons and declaration to the defendant at 95 Park Lane, Harare, by registered mail. Service by this method was finally effected. In response to it the defendant filed an unconditional notice of appearance to defend, and later filed a special plea in bar to jurisdiction, and refused to plead to the merits. On 8 September, however, it requested further particulars on the merits and, after receiving them, filed a plea in which the merits of the dispute were dealt with. It also filed a claim in reconvention. Following a request for further particulars by the plaintiff, the defendant applied for, and was granted, leave to withdraw the plea to the merits as well as its claim in reconvention.

The plaintiff adduced evidence from its Director of Production, Mr. Roland Smith, on the preliminary issue. His testimony was substantially to the effect that before the plaintiff vacated the leased premises the relationship between it and the defendant was one of landlord and tenant.

Having outlined the facts, I turn now to the submissions. *Mr. Mkushi*, for the defendant, contended with a degree of plausibility that although in South African law the doctrine of absolute sovereign immunity has yielded to the restrictive doctrine, the former doctrine remains part of the law of Zimbabwe. In a recent South African case – *Inter-Science Research & Development Services (Pty) Ltd. v. Republica Popular de Mocambique* 1980 (2) SA 111 (T) – it was held by MARGO J., with whom FRANKLIN AND PREISS JJ concurred, that the absolute doctrine had ceased to be part of the South Africa law. In the course of his judgment, the learned Judge said at 119B-C:

The first step in the inquiry is whether we should apply the absolute or the restrictive doctrine. There is an abundance of South African judicial

authority, extending to recent times, in support of the absolute doctrine. The learned Judge went on to review some of the authorities, and then said at 120C-E:

On the other hand, there is good reason to believe that the rule of sovereign immunity in international law has undergone an important change, and that the old doctrine of absolute immunity has yielded to the restrictive doctrine in which immunity is denied in respect of *acta jure gestionis* involving commercial transactions. The justification for the modern rejection of absolute immunity is two-fold. Firstly, the old-style sovereigns wielding power by acts of State, but rarely descending into commercial intercourse in foreign lands, enjoyed absolute immunity because what they did was regarded as *acta jure imperii*; but they have given way to modern governments, regularly contracting at home and abroad, and often engaged in international trading through state-owned or state-controlled corporations. Secondly, justice to the other parties involved demands that the sovereign who chooses to enter the market-places and to engage in trading operations in other countries should be held to his bargains and to his obligations.

Mr. Mkushi submitted that the change in the South African law could not, and did not, affect our law. The sheet-anchor of his submission is s. 89 of the Constitution of Zimbabwe. As amended by s. 13 of the Constitution of Zimbabwe Amendment (No. 2) Act, 1981, the section reads:

Subject to the provisions of any law for the time being in force relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

While admiring the ingenuity of the contention, I find myself unable to give effect to it. It is true, of course, that the judgment of MARCO J. in the *Inter-Science* case makes it perfectly clear that until recently South Africa embraced the doctrine of absolute sovereign immunity, and thus it seems indisputable that according to the law in force in the Colony of Good Hope on 10 June 1891 the doctrine had no bounds. But the decision of the Supreme Court on the plaintiff's appeal against the judgment of WADDINGTON J. does, in my view, rob *Mr. Mkushi's* argument of any weight it may have. One of the questions before the Supreme Court was: where does sovereign immunity begin and end? After holding that the nature of the doctrine of sovereign

immunity is a question of international law and international law is part of the law of this country, the court went on to answer that question. GEORGES JA, with whom BARON ACJ and BECK JA concurred, reviewed authorities from various jurisdictions and then said:

I am completely satisfied... that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts in this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law.

(See *Barker McCormac (Pvt) Ltd. v. Government of Kenya* (supra) at 79G (821F of the South African report)).

Mr. Mkushi recognized that he had to grapple with the Supreme Court's decision if his argument was to carry conviction. He attempted to do so by contending that by using the words "and it should be incorporated in our law" the learned Judge of Appeal was appealing to the Legislature to pass a law incorporating the doctrine of restrictive sovereign immunity and not laying down that this country embraced that doctrine. With respect to the learned advocate, I disagree. A statement in a judgment of a court of law should not be construed as if it were a provision in a statute. A judgment has to be construed as a whole, and in the light of the facts of the particular case and the issues which were to be determined by the court. It seems inconceivable that, if it entertained the view that the doctrine of absolute sovereign immunity formed part of the law of this country, the Supreme Court would have allowed the plaintiff's appeal and ordered substituted service. In any case, what would have prevented the court from saying that our law recognizes the doctrine of absolute sovereign immunity? I can see nothing.

Mr. Mkushi had an alternative argument on the point. He contended that the decision of the Supreme Court was given *per incuriam*, in that it would appear that the court's attention was not drawn to the provisions of s. 89 of the Constitution of Zimbabwe. *Mr. de Bourbon*, for the plaintiff, submitted that it is beyond the competence of this court to refuse to follow a binding decision of the Supreme Court. It would be idle to contend, in my opinion, that the Supreme Court's decision on the appeal by the plaintiff is not binding on me. In *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria* [1977] 1 All ER 881 (CA), where one of the issues was whether the rule of international law that the doctrine of sovereign immunity was not applicable to the ordinary commercial

transactions, as distinct from the governmental acts, of a sovereign State was part of English law, LORD DENNING MR, after he had considered authorities from various jurisdictions which demonstrated that in those respective jurisdictions the doctrine of absolute sovereign immunity had yielded to the doctrine of restrictive immunity, said at 891:

Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognizes the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank, '...we must take the current when it serves or lose our ventures'.

Mr. de Bourbon said that if *Mr. Mkushi's* contention prevailed, Zimbabwe would "be left behind on the bank". For the reasons I have endeavoured to give, I have no doubt that, as a result of the Supreme Court's decision, Zimbabwe is already on the other side of the river, and I have, therefore, no hesitation in holding, as I do, that *Mr. Mkushi's* submission that the absolute doctrine of sovereign immunity still forms part of the law of this country is, attractive though it is, untenable in law.

Before I turn to a consideration of the question whether, applying the restrictive doctrine to the facts of the case, the plea of jurisdictional immunity is good in law, it is necessary to examine what relationship between the parties, if any, was created when the defendant purchased the property. Relying on *Hersch v. Nel* 1948 (3) SA 686 (A), *Mr. Mkushi* contended that no contractual relationship between the parties resulted from the purchase. I respectfully disagree. It is common cause between the parties that when the defendant purchased the property the lease into which the plaintiff and Albermarle (Pvt) Ltd., the former owner, had entered was still in force. Under Roman-Dutch law a sale does not break a lease, "the new owner steps into the shoes of the old owner as landlord", the provisions of the lease, express, implied or residual, remaining unchanged: see *De Jager v. Sisana* 1930 AD 71; *de Wet v. Union Government* 1934 AD 59; *Creaser v. Smit* 1948 (4) SA 302 (T) and *Shalala & Anor v. Geth* 1950(1) SA 851 (C). In the *Shalala* case, OGILVIE THOMPSON J. with whom STEYN J. concurred, cited with approval the following passage from the judgment of MASON J. in *Scrooby v. Gordon & Co.* 1904 TS 937:

...when the owner of land which has been leased sells it to someone else the purchaser takes the land subject to the lease, so that he is bound to the tenant and the tenant is bound to him in the relation of lessor and lessee.

When, in the instant case, the property was bought by the defendant, therefore, a landlord/lessor and tenant/lessee relationship was, by operation of law, created between the defendant and the plaintiff.

An option to renew is usually an important term in a lease. Like other terms, it is binding on the new owner. This is in accordance with the principle *huur gaat voor koop*. But does the purchaser have a right to reject, as the defendant purported to do in the instant case, the exercise of the right of renewal by the lessee? The answer is: “No”. This was made perfectly clear by OGILVIE THOMPSON J. in the *Shalala* case (*supra*) in which he said at 860:

The tenant who in occupation under a lease for an initial fixed term can, by the exercise of a right of renewal contained in the lease, at his will, and irrespective of his landlord’s desires in the matter, extend the duration of his tenancy. By the unilateral act of exercising the option to renew, the tenant ensures that the duration of his lease comprehends, not merely the initial term of the lease, but the total of the initial period plus the period for which he enjoys the right of renewal.

The case of *Hersch v. Nel* (*supra*), relied upon by Mr. Mkushi, does not in my respectful view support the learned advocate’s contention. The issue there was whether the option to purchase for cash property leased is ordinarily capable of being ceded. There are no observations in the judgments delivered in the case which lend any support to the learned advocate’s contention. Upon the authorities I have cited, I would hold that the plaintiff, following the purchase of the property, became the defendant’s tenant/lessee, and that the clause giving the former the right to renew the lease was binding on the defendant as the new landlord/lessor.

I have held that it is the restrictive doctrine of sovereign immunity which forms part of the law in this country. Why have many States abandoned the absolute doctrine and, like Zimbabwe, embraced the restrictive doctrine? I am inclined to think that the answer to that question is to be found in the following passage from the judgment of LORD WILBERFORCE in *I Congreso del Partido* [1981] 2 All ER 1064 (HL) at 1070g-h:

The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of States to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with States to allow them to bring such transactions before the courts. (b) To require a State to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions.

What, then, are the exact bounds of the immunity? It is necessary to pose this question because *Mr. Mkushi* submitted that, even on an application of the restrictive doctrine, the plea of jurisdictional immunity put forward by the defendant is valid. No authority from our jurisdiction or from South African jurisdiction directly in point was cited to me and I have been no more successful in my own researches. There are, however, some authorities from some other jurisdictions which, I think, shed some light on the problem I am now confronted with. In *Alfred Dnhill of London Inc. v. The Republic of Cuba* 48 L 3ed 2d 301, a case decided by the Supreme Court of the United States, and which raised, among other things, the question of the scope of immunity, Mr. Justice WHITE, delivering the judgment of the Court, said at 314:

...the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign State's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.

(It should be pointed out that this part of the opinion was joined only by three Justices). In *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria (supra)*, STEPHENSON LJ. dealt with the point in this way at 899f-g:

The movement or trend of opinion towards restricting sovereign immunity is based on the distinction between ordinary trading transactions and governmental acts. The new doctrine would restrict immunity to the latter, labeled in Latin as *acta jure imperii*, and deny it to the former under the description of *acta jure gestionis*. The distinction between the two categories has been found as difficult to draw as the distinction between a State's agents who are not immune and a State's agencies which are.

I cannot resist the temptation to go back to the *I Congreso* case because there LORD WILBERFORCE made some useful observations regarding the bounds of the “defence” of sovereign immunity. He said at 1070j:

When... a claim is brought against a State... and State immunity is claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*'; is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into?

These authorities demonstrate, I think, that the principle of restricted immunity only accords immunity to *acta jure imperii*, i.e. acts of a purely government or public nature, and not to *acta jure gestionis*, i.e. acts of a commercial or proprietary nature.

But how do courts distinguish *acta jure imperii* from *acta jure gestionis*? I think *Claim against the Empire of Iran* (1963) 45 ILR 57, a case decided by the Constitutional Court of the Federal Republic of Germany, is helpful in answering that question. Briefly, the facts of the case were as follows. A firm of builders in Cologne carried out some repairs to the central heating system in the Embassy of the Empire of Iran on the instructions of the ambassador.

Their claim was for the cost of the repairs. The question was whether the Iranian Empire, a sovereign State, could be sued for the recovery of the money in German municipal courts. The court answered the question in the affirmative, holding that the contract for repairs was to be regarded as a non-sovereign function of the foreign State. In the course of its judgment the court said at 80:

As a means for determining between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its foreign sovereign authority, that is in public law, or like a private person, that is in private law.

And a little later the court went on to say (at 81):

This Court has therefore examined the argument that the conclusion of the contract for repair is to be regarded as a non-sovereign function of the foreign State, and has accepted this proposition as correct. It is obvious that the conclusion of a contract of this kind does not fall

within the essential sphere of State authority. It does not depend... on whether the conclusion of the contract was necessary for the regular transaction of the Embassy's affairs and therefore stood in a recognizable relationship with the sovereign functions of the sending State. Whether a State is entitled to immunity does not depend on the purpose of the function which the foreign State is thereby pursuing.

Both passages were cited with approval by LORD WILBERFORCE in the *Congreso* case, where LORD BRIDGE OF HARWICH said at 1082j-1083c;

It does seem to me that two propositions can be derived from the relevant authorities which may often... provide a useful guide in deciding whether or not a claim to sovereign immunity can be sustained. First, if a sovereign State voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character. Examine: State A orders uniforms for its army from a supplier in State B; when sued for the price in the courts of State B, State A cannot claim immunity on the ground that the maintenance of its army is a sovereign function. This is really elementary. But it leads on logically to the second proposition that, having assumed a purely private law obligation, a sovereign State cannot justify a breach of the obligation on the ground that the reason for the breach was of a sovereign or governmental character. Example: State A, having ordered uniforms for its army from a supplier in State B, repudiates the contract; when sued in the court of State B for damages, State A cannot claim immunity on the ground that, since the placing of the contract, a government of a new political complexion has made a sovereign decision, pursuant to a policy of total disarmament, to disband the army.

It is not in dispute that the defendant purchased the property for the purpose of using it as its High Commission. *Mr. Mkushi* submitted that, this having been the purpose, the purchase was an act *jure imperii*. I think this contention may well be valid, but it is not helpful to the defendant in this case as far as its plea for jurisdictional immunity is concerned. Its purchase of the property did not in any way interfere with the rights of the plaintiff as a lessee and, therefore, that act could not be the subject matter of complaint by the plaintiff. The act which forms the basis of the plaintiff's claim is the alleged breach by the defendant of the lease and not the purchase of the property. Assuming that the alleged breach did take place, it is clear that it happened because the defendant

wanted to use the leased premises as part of its High Commission. Does this reason make the refusal by the defendant to allow the plaintiff to continue occupying the leased premises an act *jure imperii*? I do not think so. The purpose for which a breach is committed cannot alter its character. The defendant's act of entering into a landlord/lessor and tenant/lessee relationship with the plaintiff was, in my judgment, a non-sovereign act. The fact that the defendant found it necessary, for security or other reasons, not to have tenants in the building cannot, in my opinion, convert the non-sovereign act into a sovereign act. In *I Congreso del Partido* [1981] 1 All ER 1092, LORD DENNING MR said at 1102e-g:

...there is always some action taken or omitted by the foreign government or by one of their separate legal entities which gives rise to the dispute. Sovereign immunity depends on the nature of that action: not on the purpose or intent or motive, use whichever word you like, with which it is done. To prove this I would take the old chestnut. All the pundits say that when a government department places an order for boots for the army it is acting *jure gestionis*, not *jure imperii*; but when it places an order for guns it is *jure imperii*. I cannot accept that distinction. Suppose the navy department of a foreign government orders a helicopter for military purposes and their agriculture department orders a like helicopter for surveying the fields. In neither case is the foreign government entitled to sovereign immunity. The seller is not concerned with the purpose for which the helicopter is required. Likewise with a gun. The seller is not concerned whether the foreign government wants it to kill an enemy or to fire a salute or to train recruits.

And in the *Trendtex* case (*supra*) SHAW LJ. Said at 911d-e:

...I should make it very clear that I regard the intrinsic nature of a transaction rather than its object as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise of sovereign authority.

In his powerful submission, Mr. de Bourbon contended that, though its factual situation could be distinguished, the case of *Etat Espagnol v Societe Anonyme de l'Hotel George V* (1970) 52 ILR 317 is very helpful in determining the preliminary issue raised by the defendant. I agree. The facts of that case can be stated briefly. The Spanish Consul General in Paris, on behalf of the Direccion General del Turismo, a department of the Spanish State connected with the Ministry of Information and Tourism, concluded a lease of premises in the city. The lease, which was

approved by the Spanish council of Ministers, was drawn up in the form of, and contained the terms and conditions usual in, a normal lease of commercial property. Three years after the lease had been entered into, the owners of the premises, the Hotel George V. company, instituted proceedings in the Tribunal de Grande Instance of Paris for eviction of the Direccion General del Turismo. Intervening in the proceedings, the Spanish State claimed jurisdictional immunity. The plea failed, the court holding that the conclusion of the lease was a commercial act, governed by private law, not an act of sovereignty, and, therefore, the Spanish State was not entitled to jurisdictional immunity. Almost at the end of its judgment, the court said at 321:

We conclude from these facts that the lease, far from containing clauses which are not of private law character, reaffirms, on the contrary, all the usual stipulations. Therefore the Direccion General del Turismo contracted with the Hotel George V company in the form, in the manner and in accordance with private law, as if it had been an individual. It acted in performance of an activity which is at least in part commercial, and without recourse to the exercise of any public authority. There is no fact indicating that in so acting the department performed an action involving the sovereignty of the Spanish State.

I have no doubt, guided, as I am, by this decision and the other authorities I have referred to, that the acts of the defendant which have given rise to the instant case were of non-sovereign character. Having reached that conclusion, I do not find it necessary to deal with *Mr de Bourbon's* not uninteresting argument that, if the defendant's plea of jurisdictional immunity is good in law, the facts of the case demonstrate that the defendant has submitted to the jurisdiction of this court, thereby waiving its immunity to the suit.

For the reasons I have given, I hold that the special plea to jurisdiction has no merit. It must be, and is, dismissed with costs.

Winterton Holmes & Hill, legal practitioners for the plaintiff
Sawyer & Mkushi, legal practitioners for the defendant

IN THE HIGH COURT OF TANZANIA
AT SINGIDA
ECONOMIC CRIMES JURISDICTION
(DODOMA REGISTRY)
ECONOMIC CRIMES CASE No. 8 OF 1987
THE REPUBLIC
Versus
1. KARAGHA RUSUNGU
2. ATULI YAIGO

JUDGEMENT

SAMATTA, J.:

The two accused in this case stand charged with cattle theft, contrary to section 59(2) of the Economic and Organized Crime Control Act, hereinafter referred to as the Act, and paragraph 12(1) and (3) of the First Schedule to the Act, it being alleged by the Director of Public Prosecutions that the accused, to quote the particulars of offence, “on or about the 27th day of January, 1985, at Makunda village within the district of Iramba, in Singida Region, did steal 145 head of cattle valued at Tshs. 145,000/= and 17 goats valued at Tshs. 17,000/= the property of SHABANI NTANDU, YOHANA NGONYA, DUDU WAWA AND MICHAEL NZALI”. Both accused pleaded not guilty to the charge.

The area in dispute in this case is fairly narrow. The following matters are not disputed:

1. That on 27/1/85, at Makunda village, Iramba District, 145 head of cattle and 17 goats belonging to the complainant, Shabani Ntandu, Yohana Ngonya, Dudu Wawa and Michael Nzali, were stolen.
2. That the total value of the said 145 head of cattle and 17 goats is Tshs. 162,000/=.
3. That the accused persons were arrested by villagers in connection with the theft.

In terms of section 34(3) of the Act, all these three facts are deemed to have been duly proved.

The principal question before us is whether the accused persons or either of them took part in the theft, and, if not, whether the accused persons

are guilty of any other offence. The prosecution called eight witnesses. The First Accused gave evidence on oath and his co-accused gave evidence without taking the oath. Neither accused called any witness. It is not disputed that on the afternoon on 27/1/85, while they were grazing 145 head of cattle and 17 goats in the wilderness, Michael Nzali and Julius Nehemia were robbed of those animals by a group of about six men who, according to the latter man, did not include the Second Accused. The two men raised an alarm to which many villagers responded. On that day the people searched for the stolen animals but in vain. On the following day a group of people which included Michael Nzali and Julius Nehemia followed spoor and found themselves at a place in the wilderness where there was a temporary home. Both Michael Nzali and Julius Nehemia told this Court that they saw the Second Accused there together with three young men. There was a kraal at the premises. On searching the beasts in the kraal, the search-party identified six head of cattle and 17 goats. These were some of the animals which had been stolen on the previous day. The Second Accused told the search-party that the animals arrived there on the previous night. The search-party arrested the Second Accused and the three young men and escorted them to Ndago Primary Court, taking with them the recovered beasts.

The evidence implicating the 1st accused with the theft of the 145 head of cattle and 17 goats was given by Athumani Mkoma and Emmanuel Mwiru. The former told this Court that on 27/1/85 at about 9.00 p.m. his herd of cattle made some unusual noise in the kraal. He got out and noticed some strange cattle in a shamba near his house. The cattle were being driven by a group of four men. The witness went to seek the help of his son-in-law, Emmanuel Mwiru, who also happens to be the village secretary. On coming back, the witness asked his wife to sound an alarm after he had hidden himself in a cassava shamba. The wife did so and many people responded to the alarm. On hearing the alarm, the four persons who had been driving cattle abandoned the animals and took to their heels. According to Athumani Mkoma, the First Accused was one of the four men.

The witness told the Court that on hearing the alarm, the First Accused threw away his bow and arrows and, like his companions, took to his heels. Unlike his companions, the First Accused was not very lucky. He tripped over a ridge and fell down and the villagers immediately apprehended him. They collected the abandoned cattle – 98 in number – and drove them to Ndago Primary Court where the First Accused was surrendered.

According to Athumani Mkoma, on interrogation by villagers at the village the First Accused confessed to have participated in the theft of the recovered beasts in the wilderness. The testimony of Emmanuel Mwiru substantially tallied with that of his father-in-law, but he said that, as he was very busy preventing villagers from assaulting the First Accused, he did not hear the accused person's confession of the theft. The 98 beasts were later identified by the complainants, who have described in detail in Court the identifying marks which those animals bore.

The First Accused's story can be outlined as follows:

He is a resident of Igongolo village in Igunga District. On 21/1/85 he and one Kawonga Malani and Masanja Luhele left their area for Iramba district for the purpose of buying some grain. They had five donkeys between them. By 27/1/85 they had accomplished their mission. They spent the night of 26-27/1/85 at the house of one Mwininga Mwandu at Ndago. The first accused told the Court that on the morning of 27/1/85 he had a running stomach. At about 8.00 a.m. on that day, the accused person went on to tell the court, he left his companions and went into the bush to answer a call of nature. He stayed there for a fairly long time. His companions had decided not to wait for him. They had the 5 donkeys. When he came out of the bush he started following his companions. On the way, he was accosted by a group of three men and two women. These persons wanted to know where he was coming from. He told them that he had been on a mission of purchasing some food. They then wanted to know where the purchased food was, to which question he responded by saying that his colleagues had the food. After he had told them, in response to their question, that his home was in Iganga, the five people said, "These are the people who steal from us". They then demanded to see his permit. He had one and gave it to them. After they had scrutinized the document, the people said that they still did not believe his story.

They proceeded to arrest him and said they would escort him to Ndago. On the way they tore the permit. After reaching Ndago the accused person was driven to Kiomboi where, on the following day, he was charged with the theft of 145 head of cattle and 17 goats. The First Accused asserted that both Athumani Mkoma and Emmanuel Mwiru, who he did not know prior to this case, had fabricated evidence against him.

We must now summarise the evidence of the Second Accused. It was a very short story. It was as follows:

When members of the traditional defence organization popularly known as SUNGUSUNGU started moving around his district, the accused abandoned his village – Kibaya – and drove his cattle to the wilderness. He was accompanied by some of his relatives. He and those people walked for six days. On the seventh day they set up a temporary home and kraal. After they had spent two nights there he was arrested by the complainants and escorted to Ndago from where he was taken to Kiomboi. The Second Accused asserted that he does not know what he stole.

Briefly, that was the evidence laid in the scales in this case. We propose to deal with the case against the Second Accused first. We have anxiously and, we hope, properly considered that case and we have reached the conclusion – not without some reluctance – that on the evidence before us the Second Accused cannot be convicted of any offence in law. The evidence of Julius Nehemia is very clear: the witness said that the Second Accused person was not one of the six persons who stole from him (the victims) and Michael Nzali 145 head of cattle and 17 goats. On the basis of this evidence alone the accused must be acquitted of the theft of the beasts. But should the Second Accused not be convicted of receiving stolen cattle - 6 head of cattle and 17 goats? Our considered answer to that question is No. There can be no controversy over the fact that receiving property suspected to have been stolen is not an economic offence. Since, according to section 43 of the Act, an accused person can be convicted of an alternative offence only if that particular offence is an economic offence, the Second Accused cannot in law, in our judgment, be convicted of receiving property suspected to have been stolen because, as already pointed out, that offence is not an economic offence. This is an unsatisfactory state of the law and we express the hope that an amendment to the section will be affected soon.

We have considered whether any conviction of the Second Accused can be registered under section 3(1) of the Stock Theft Ordinance (Cap. 422), but we have reached the settled opinion that that section merely provides a presumption, and does not create the offence of possession of stock suspected of having been stolen. For the reasons we have endeavoured to give, it becomes our duty to acquit the Second Accused of the charge laid at his door. Unless his personal liberty is otherwise lawfully assailed, the Second Accused be set at liberty forthwith.

We turn now to the case against the First Accused. We hold and find as a fact, upon the undisputed evidence before us, that 145 head of cattle and 17 goats belonging to the complainants were stolen at Makunda

village on the afternoon of 27/1/85. We also hold and find as a fact that that crime was perpetrated by a group of about six persons. Was the First Accused one of those persons? To this question we now devote our attention. Both Athumani Mkoma and Emmanuel Mwiru impressed us as very honest and reliable witnesses. They gave their evidence in a most impartial manner. They had no axe to grind in this case. The First Accused, on the other hand, was, in our opinion, an unmitigated liar. We are not at all surprised that he expressed no intention to call Karonga Makani, Masanja Luhele and Mwininga Mwandu or any of them as his witnesses although he must have appreciated that if what he has told this court is true, the evidence of those people would have assisted him very much. Of course, we appreciate that the accused person bore no burden to establish his innocence, but we think that if his story were true the accused would have been anxious to call at least one of the three men to come to court and give evidence on his side. We can see no reason – and the accused person made no attempt to offer any – why Athumani Mkoma and Emmanuel Mwiru should have been so wicked as to fabricate evidence against the accused, a man they did not know before this case. We are satisfied, for the reasons we have given, that the two men told this Court nothing but the truth. We accept their evidence without reservation and, in so far as it is inconsistent with the prosecution case, reject that given by the accused person. Upon the evidence we have accepted, we hold and find as a fact that the First Accused was arrested by Athumani Mkoma and Emmanuel Mwiru and their fellow villagers at the time, place and under circumstances described by the two prosecution witnesses.

We also hold that the accused person confessed to having taken part in the theft of the beasts, the subject-matter of this case. Acting upon the confession and invoking the doctrine of recent possession, we find and hold as a fact that the accused person was one of the six persons who stole the 145 head of cattle and 17 goats. Accordingly, we find the First Accused, Karagha Husungu, guilty as charged. We convict him accordingly.

B.A. Samatta

Sgd.....

JUDGE

1st Member

Sgd.....

2nd Member

IN THE HIGH COURT OF TANZANIA AT DODOMA

TABU FIKWA v. REPUBLIC

(Samatta, J.)

1st June, 1988 – DODOMA

Cases referred to:

Hattan v. R. [1969] HCD 234.

Silvanus Leonard Nguruwe v. R. [1981] TLR 67.

Rweyongeza, for the Appellant.

Mwambe, for the Republic.

SAMATTA, J.:

On March 10, 1988, the appellant, Tabu Fikwa who, according to the charge-sheet, is aged 33 and was employed as a nurse at the Government Hospital, Dodoma (according to Mr. Rweyongeza, her counsel, however, her title at the hospital was that of assistant nurse), was, together with five others, brought before the District Court of Dodoma District and charged with unlawful possession of illicit liquor commonly known as *moshi*, contrary to section 30 of the *Moshi* (Manufacture and Distillation) Act, 1966. The particulars of offence alleged that the appellant and her co-accused:

... jointly and together on 7th day of March, 1988, at about 20.30 hrs at Bahi Road within the Municipality, District and Region of Dodoma, were found in possession of one and a half litres of native liquor commonly known as *moshi*. The appellant's plea to that charge was:

It is true. I was found with native liquor known as *Gongo* without permit.

All the appellant's co-accused protested their innocence. Their trial is yet to be completed. The learned District Magistrate entered the appellant's plea as a plea of guilty to the charge laid at her door.

The prosecutor, in accordance with the time-honoured practice, then outlined the facts of the case. He said:

On the 7th March, 1988, at about 8.30 p.m., at Bahi Road in Dodoma one No. B 9457 Detective Corporal Selemani was on duty (patrol) at Bahi road. He found the 1st accused in her house where many people gathered, and then discovered that those people were taking local liquor commonly known as *gongo*. He arrested them all (including) the 1st accused who

was also among them and taking the same liquor without permit. The charges were (then) opened against them as per charge sheet.

The appellant admitted that this outline correctly represented what had happened, whereupon the learned District Magistrate convicted her upon her own plea of guilty. The appellant, who is a first offender, then addressed the court in mitigation. She said very little. In fact she uttered just one short sentence, which was as follows:

I have got problems, that is why I manufacture *gongo*.

Immediately after the appellant had said this, the learned District Magistrate proceeded to sentence her. He said:

The accused is a first offender. I have taken into consideration her mitigating factors, but taking into account the rampancy (sic) of the offence in the area, the accused is sentenced to 5 (five) months jail.

Citing *Cross and Jones Introduction to Criminal Law*, 7th Edn. At p. 379, and *Hattan v. R.* [1969] HCD. 234, Mr. Rweyongeza submitted that, having regard to the circumstances of the instant case, the learned District Magistrate erred in not giving the appellant the option of a fine. Supporting the decision of the learned District Magistrate, Mr. Benne, for the Republic, contended, with a degree of plausibility, that no circumstances existed in this case making a custodial sentence inappropriate.

In this appeal I ask myself this question: Is there any merit in Mr. Rweyongeza's submission? I would answer that question in the affirmative. It is not necessary, I think, to cite any authority for the proposition that the following principles form part of the law of this country:

1. An offender is a member of society and quite often a product of social and economic conditions. If his interests and those of society are in conflict the former must be subordinated to the latter. If, however, they can be reconciled the court should embark upon that course.
2. In determining or assessing sentence what the court must consider is the triad consisting of the offence, the offender and the interests of society. Thus, the magnitude of the offence, motives to its commission and the character of the offender are some of the matters which the court must have regard to. The court must strive to strike a reasonable balance between the elements of the triad.

3. When called upon to impose punishment upon the offender a judicial officer would be right in appreciating that the natural indignation of interested parties and of the community at large should receive some recognition in the sentence he imposes, but he would be wrong – very wrong – if he assesses the sentence simply upon the basis of the indignation. It is not sufficient for punishment to be fair to society, it must also fit the crime as well as the criminal. Righteous anger should not becloud judgment.
4. While it is impossible to over-emphasize the need for justice to be done, it must always be remembered that mercy, not a sledge-hammer, is justice's concomitant. In Sentencing a fellow mortal, therefore, an insensitively censorious attitude should be avoided. It is wrong to equate the approach of mercy or plain humanity with maudlin sympathy or misplaced pity for the offender. Mercy is an element of justice itself. It is not unlikely that it was his belief in the correctness of that notion which inspired William Shakespeare (in *Measure for Measure*, Act 11, Section 2) to observe, through Isabella, that:

No ceremony that to great ones longs,
 Not the king's crown, nor the deputed sword,
 The marshal's truncheon, nor the judge's robe,
 Become them with, one half so good a grace,
 As mercy does.

1. Deterrence is a well-recognised purpose of punishment, but imprisonment has never been regarded by judges, lawyers or experts in penology as being the only punishment which is appropriate for that purpose. The object of punishment to hurt the offender (the justness of the object is, understandably, a subject matter of serious controversy) can fairly often be met by a substantial fine. The fine has several advantages which the punishment of imprisonment lacks. These are mentioned by Alex Samuels in his article, "The fine: The principles" (see [1970] *Crim. L.R.* 201) where he says, *inter alia*:

The fine is simple, uncomplicated, adaptable and popular, because it involves no expense to the public, no burden on the prison system, no social dislocation and less stigma than most other criminal sanctions. Stigma tends to impede reformation.

2. In determining or assessing sentence the court is perfectly entitled to take into account the necessity of deterring other persons from

perpetrating similar offences, but that factor is not the sole or predominant basis for assessment of sentence.

3. Generally speaking, imprisonment is only justified if it is necessary that the criminal be removed from society. Save where the nature of the offence and the circumstances of its commission call for a custodial sentence, or where the court has no discretion in the matter because the offence attracts a mandatory sentence of imprisonment under the Minimum Sentences Act, 1972, or under any other legislation, the court should seriously consider alternative punishments before sending an offender to prison, especially if he is a first offender.
4. The deterrent effect of a sentence of imprisonment is not always proportionate to its length.
5. The imposition of a substantial fine can have a deterrent effect and may constitute adequate penalty even in a case of serious nature. Its appropriateness or otherwise always depends upon the circumstances of each case.
6. Every reasonable effort should be made to keep first offenders out of prison. Where appropriate, however, the court will send a first offender to prison to demonstrate that crime does not pay or to protect genuine and important interests of the society. A fine will not be imposed on an offender, even a first offender, where that punishment is considered by the court, after having paid due weight to each of the relevant factors, including the interests of society, as being inappropriate.
7. The remorse or repentance, expressed *inter alia* in a plea guilty, is a mitigating factor and must be given due weight by the court when sentencing the offender.
8. The prevalence of an offence and the need for sentence to deter the perpetration of it in future must not be permitted to outweigh the appropriate sentence for the offence itself. Prevalence of offence should be given no more than the weight it deserves. Failure to adhere to that rule may result in an offender being kept in prison for longer than is necessary to protect the interests of the offenders, of society or both. In ordinary cases the judicial officer should steer a course between the *Scylla* of misplaced pity and the *Charhybdis* of severity.

It was once observed by a distinguished jurist – with respect, correctly in my view – that, compared with the task of deciding which sentence should be imposed on the offender, trying an accused person is as easy as falling off a log. That difficult task must nevertheless be discharged. The offence which the appellant was convicted of attracts the maximum sentence of five years imprisonment. Bearing that in mind, it is as plain as a pikestaff, in my opinion, that Parliament regards the offence as a serious one, is not surprising that the offence is so regarded.

According to the report of the Government Chemist, put before the learned District Magistrate, those who drink *moshi* are likely to suffer from the following:

- a. damage to the eye-sight;
- b. very serious damage to the liver;
- c. damage to the nervous system; and
- d. general deterioration of health.

It must be correct to say, therefore, that widespread drinking of *moshi* is bound to have extremely harmful effects on the lives of the drinkers, their families as well as on the life of the community at large. Seriousness and prevalence of an offence are, however, just two of the many factors which the court is required to take into consideration in assessing sentence. In the present case the fact that the (serious) offence of unlawful possession of *moshi* is a prevalent one (in Dodoma) had to be weighed against the strong mitigation factors which existed in the case, to wit:

1. the appellant is a first offender;
2. she expressed contrition by pleading guilty to the charge;
3. the amount of the illicit spirit she was found in (unlawful) possession of – One and a half litres – was not considerable;
4. while the method she chose to use in the war against inflation is unquestionably condemnable, hard life seems to have been the thing which drove her to desperation; and
5. she was gainfully employed as an assistant nurse for many years before she foolishly chose to fight inflation by manufacturing and selling *moshi*.

The learned District Magistrate appears to have entertained the view, that, because the offence she was convicted of happens to be a common one, the appellant had to receive a severe sentence.

With respect, this was wrong approach in law. I should have thought that the decision of the Court of Appeal in *Silvanus Leonard Nguruwe v. Republic*, [1981] TLR 67 inflicted a fatal blow on that approach. Speaking through Mwakasendo, J.A., the Court said, at p. 68:

Prevalence of an offence is indeed a factor which a trial court should always take into account when assessing a proper sentence to impose in any particular case; but it would be contrary to principle to consider this factor either as the predominant or only factor that must guide the court in its consideration of sentence.

Section 30 of the *Moshi* (Manufacture and Distillation) Act, 1966 (hereinafter referred to as the Act) which creates the offence the accused was convicted of reads as follows:

30. Any person, other than a licensee or a distiller, who has *moshi* in his possession shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding five years.

It leaps to the eye that there is no mention in the section of punishment of a fine. It is an elementary principle of common law that where a statute creating an offence lays down in no un-certain terms the sort of punishment to be imposed on the offenders against that statute, it is incumbent on the court called upon to enforce the law to act within the strict language of the law. The section does not, in my considered opinion, bring that principle into play. I hold that view because, in my opinion, the legislature having used the word “liable” in the section, imprisonment becomes the maximum, and not the sole, punishment which can be imposed on the one contravening the section. But assuming that that interpretation of the section is wrong, it seems to me that the application of the common law principle in this case must be subject to section 27(3) of the Penal Code, which reads:

A person liable to imprisonment may be sentenced to pay a fine in addition to, or instead of, imprisonment.

That being so, it cannot be doubted, in my opinion, that in the instant case the learned District Magistrate had the discretion at least to impose on the appellant the punishment of a fine. Did he exercise that discretion judicially? I am decisively of the view, having given anxious and, I hope, careful consideration to both aggravating and mitigating circumstances in this case, that that question must be answered in the negative.

In my opinion, the learned magistrate ought to have exercised his discretion in accordance with what was laid down by Georges, C.J. (as

he then was) in *Hattan v. Republic* (supra). In the course of his judgment the learned Chief Justice said:

I am quite satisfied that the learned Resident Magistrate was misdirecting himself, when he stated that a fine albeit heavy, would not meet the requirement of this case. “Wherever a first offender is concerned the emphasis should always be on the reformatory aspect of punishment unless the offence is one of such a serious nature that an exemplary punishment is required, or unless the offence is so widespread that severe punishment is needed as a shock deterrent.

The appellant in that case, an American seaman, stole a radio belonging to a prostitute who he had met on his day-off when his vessel called at Dar es Salaam. The magistrate’s court sentenced him to six months’ imprisonment. The sentence was varied to a fine of Tshs. 1,000/= or, in default of payment, three months’ imprisonment. In my opinion, neither exemplary punishment nor a severe punishment as a shock deterrent was necessary in the instant case. Bearing in mind the existence of strong mitigating factors in the case, I am decisively of the opinion that the sentence meted out to the appellant is manifestly excessive and that deterrent purposes and the interests of society could have been attained by means of imposition of a substantial fine. But since the appellant has already served slightly over half of the custodial sentence imposed on her, it would not be fair to the appellant, in my opinion, to set aside the sentence of imprisonment and substitute therefor a fine. In my view, the period the appellant has spent in prison serving that sentence is a sufficient punishment for the crime she was convicted of and an adequate and firm warning to others not to contravene section 30 of the Act. I would, therefore, allow the appeal to a limited extent by reducing the sentence of five months’ imprisonment to such term of imprisonment as would result in the appellant’s immediate release from custody.

IN THE HIGH COURT OF TANZANA

AT DAR-ES-SALAAM

VIDYADHAR GIRDHARAL CHAVDA

Versus

THE DIRECTOR OF IMMIGRATION SERVICES AND OTHERS

(Samatta, JK)

MISC. CIVIL CAUSE NO. 5 OF 1995

March 7, 1995 – DAR ES SALAAM

Order accordingly Cases referred to:

M v. Home Office [1993] 3 WLR 433

R V. Bishop of Oxford [1879] 4 QBD 245

Mkono for the applicant.

Mallaba for the respondents.

SAMATTA, JK:

In this application, an issue of novelty and great importance arises, namely whether this court has the power to grant an injunction against the Government, a government minister or official. The issue has arisen in this way. The applicant is engaged in a legal battle against a deportation order made against him by the second respondent, who is Minister for Home Affairs, under the Immigration Act. On 2 February 1995, he filed before this Court an application against the Director of Immigration Services (the first respondent), the second respondent and the Attorney General, who was made a party to the proceedings in compliance with s. 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Act, 1968, as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 1991, for two reliefs, namely; (1) leave to apply for order of *certiorari*, *mandamus* and prohibition, and (2) an injunction (in the Chamber summons the word used is prohibition) restraining the first two respondents, pending the disposal of the prior application, from detaining or deporting him for reasons which need not be given here. The application for injunctive relief was heard a day before the application for leave was heard. Mr. *Mallaba*, Senior State Attorney, appearing for all the three respondents, strongly opposed the

application (for injunction) contending that this Court, before granting leave to apply for *certiorari*, *mandamus* or prohibition, has no power to grant an interim order. I rejected the argument and made an order restraining the first and second respondents, pending the hearing of the application for injunctive relief, from detaining or deporting the applicant.

When, six days later, the application for interlocutory injunction was called on, Mr. *Mallaba* raised a point *in limine*. He contended, citing s. 11 of the Government Proceedings Act, 1967 (the Act), that this Court has no power to make an injunctive order against the Government, its ministers or officials. According to the learned Senior State Attorney what the Court can do in circumstances in which the parties are private persons is grant injunctive orders, or to make an order declaratory of the rights of the parties. Section 11 of the Act reads:

11. (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require:

Provided that –

(a) Where in any proceedings against the Government any such relief is sought as might in proceedings between private persons be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

11. (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

The term ‘civil proceedings’ is defined in s. 2(1) of the Act as including proceedings in this court or a magistrate’s court for the recovery of fines or penalties, and the phrase ‘proceedings against the Government’ is defined by the same subsection as including a claim by way of set-off or counterclaim raised in proceedings by the Government. Mr. *Mkono*, for

the applicant, sought to counter Mr. *Mallaba's* argument by contending that s. 11 of the Act has no application where Article 30 of the Constitution of the United Republic (Constitution) is applicable. It was the learned advocate's contention that the Constitutional provision is applicable to the instant application. He drew my attention, citing *M v. Home Office* (1) that in spite of the fact that s. 21 of the Crown Proceedings Act, 1941, contains prohibitions identical with those imposed by s. 11 of the Act, the House of Lords decided, in the cited case, that courts in England have the power to issue coercive orders, including injunctions, against a government minister or department. Section 11 of the Act and s. 21 of the English legislation are, save for the use of the words 'Crown' and 'subjects' instead of 'Government' and 'private persons', respectively, *in pari materia* with Article 30 of the Constitution which deals with limitations upon and the enforcement and protection of basic rights and duties.

It cannot be doubted that Mr. *Mallaba's* preliminary point raises an issue of considerable importance on the enforcement by this court of the provisions of the Law Reform Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968, the legislation which confers on this court the power to grant prerogative orders. While I find Mr. *Mkono's* argument concerning Article 30 of the Constitution very interesting, I do not find it necessary, in law, to determine Mr. *Mallaba's* preliminary point on Constitutional grounds. I think the point can be adequately dealt with on non-Constitutional grounds. It is a rule of Constitutional interpretation that if the court can decide a case before it on non-Constitutional grounds, that course should be preferred; see *The Guide to American Law*, at 375. I proceed, therefore, to consider the merits or otherwise of the non-Constitutional contentions addressed to me.

The decision of the House of Lords in *M v. Home Office*, *supra*, demonstrates, I respectfully think, the modern approach of courts towards their (courts) duty to control government actions and omissions which affect the freedoms and rights of the individual. The complex facts of the case are accurately summarized by the learned authors of *Cases and Materials on Constitutional and Administrative Law* 3rd ed at 197 – 198. I gratefully adopt that summary:

M, a citizen of Zaire, arrived in the UK seeking political asylum. The Home Office rejected his application and ordered his removal from the UK, which was to take place by 6.30 p.m. on 1 May 1991. At 5.20 p.m. (after the Court of Appeal had refused an application for leave to apply for judicial review of the decision) a fresh application for leave to apply to move for judicial

review, alleging new grounds, was made to Garland J. in chambers. Garland J. indicated at about 5.30 p.m. that he wished his departure to be postponed pending consideration of the application, and he understood from counsel for the Home Office that an undertaking to that effect had been given. (Counsel understood that he had only undertaken to endeavour to prevent M's removal). Due to bungling and breakdown in lines of communication, M's departure was not prevented nor was he removed from the onward flight to Zaire during a stopover at Paris. At 11.20 p.m. Garland J, being informed of M's removal from the jurisdiction, made an *ex parte* order requiring the Home Secretary to procure the return of M to the jurisdiction and granting the Home Secretary the liberty to apply for variation or discharge of the order on the morning of 2 May. Home Office officials then made arrangements for M's return. On the afternoon of 2 May, the Home Secretary, having taken advice from his officials and Treasury Counsel, concluded that the underlying asylum decision had been correct and that Garland J's *ex parte* order, being a mandatory interim injunction against a minister of the Crown, had been made without jurisdiction. Thereupon he cancelled the arrangements for M's return. On 3 May he applied to Garland J to set aside the order of 1 May, which Garland J did. Proceedings were then brought on behalf of M against the Home Office and the Home Secretary alleging contempt of court in respect of the breach of the undertaking and the *ex-parte* order requiring M's return. Simon Brown J dismissed this motion on the basis that since the Crown's immunity from injunction was preserved by s. 21 of the Crown Proceedings Act, 1947, neither it nor its departments, ministers and officials acting in the course of their duties could be impleaded for contempt of court. The applicant appealed.

The Court of Appeal, by a majority, allowed the appeal, holding that Brown J had mistakenly interpreted the law. The original order by Garland J should not have been made as injunctions could not be issued against the Crown. The Court went on to hold, however, that as the order was binding until set aside, failure to comply with it constituted a contempt. It also held that while the Crown and Governments Departments are not subject to the contempt jurisdiction of the High Court because they are non-persons, Mr Baker, the Home Secretary, was personally guilty of contempt. The Home Secretary appealed and the applicant cross appealed in respect of his original application against the Home Office. The House of Lords had to decide two issues of Constitutional import, namely:

1. Could an injunction be issued against a government minister, and
2. Could a government minister or department be found to be in contempt of court for failure to comply with an order of court?

The House answered both issues in the affirmative. Their Lordships founded their decision on two grounds; first, on the wording of s. 31 of the Supreme Court Act, 1981, which essentially, contains provisions regarding (i) the procedure for applying for prerogative orders of mandamus, prohibition and certiorari, (ii) the powers of the High Court in such applications and (iii) non-prerogative reliefs which may be sought and granted in an application for prerogative orders and (2) on the undesirability of the English law being inconsistent with the Community law on the matter. Their Lordships were of the opinion that s. 21(2) of the Crown Proceedings Act, 1947, did not apply to judicial review jurisdiction as that branch of the law was controlled by the Supreme Court Act. In the course of his speech, Lord Woolf (with whom all their Lordships agreed) said, at 456H–C:

... as in private law proceedings, once the Crown or a body representing the Crown is a party to proceedings, unless some express restriction exists, the Crown, like any other litigant, is liable to have interlocutory orders made against it with which it is required to comply....

And at 461 his Lordship said:

[the] decision not to amend section 21 (of the Crown Proceedings Act) is not really surprising bearing in mind that the exercise in hand related to public law proceedings while section 21 dealt with private or 'civil' law proceedings.

In the course of his short speech, Lord Templeman said, at 431:

My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a Minister in his official capacity would, if upheld establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War. For the reasons given by noble and learned friend, Lord Woolf, and on principle, I am satisfied that injunctions and contempt of court proceedings may be brought against the minister in his official capacity ...

What is the legal position here in Tanzania? To that question I now turn my attention. Is the scope of the meaning of the words 'civil proceedings' in s. 11 of the Act (the Government Proceedings Act, 1967), so wide as to embrace proceedings in which, as in the instant application, a temporary injunctive relief is sought? Although in the Act there is no provision similar to s. 31 of the Supreme Court Act (of England), I am of the settled opinion, bearing in mind the definition of term 'civil proceedings' in s. 2(1) of the Act, and taking into account of the definition of the phrase 'proceedings against the Government' given in the same subsection,

that the word 'civil' there has not been used to mean the opposite of 'criminal'. Thus, Constitutional proceedings and proceedings which are instituted under this Court's supervisory jurisdiction, that is to say, the jurisdiction to supervise statutory and domestic tribunals conferred on the court by s. 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Cap. 360) as amended by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968, must be held to be excluded by the term. The term was intended to have a restricted meaning; it was intended to mean civil matters as understood in the traditional sense of the term, that is to say, civil matters that are dealt with under this Court's general civil jurisdiction. Any statutory provision which purports to restrict this courts jurisdiction, including inherent jurisdiction, must, in the interests of everyone living within the territorial boundaries of the United Republic, be construed strictly. The application of that principle in the interpretation of s. 11 of the Act compels me to hold, as I have already indicated, that the term 'civil proceedings' in the subsection does not embrace prerogative proceedings. In my opinion, s. 11 is related to private law litigation only.

Even assuming that the words 'civil proceedings' cover prerogative proceedings, I would still regard Mr. *Mallaba's* contention as untenable in law, because there is another ground which compels the rejection of that argument. The relief referred to in s. 11(1) of the Act must, in my considered view, be a relief other than an injunction and specific performance. I have not the faintest doubt that to construe the subsection otherwise would make the words 'by way of' therein superfluous. It is a settled canon of statutory interpretation that a statute should be so construed that, if it can be prevented, no clause, phrase sentence or word shall be superfluous, void or insignificant: See *R v. Bishop of Oxford* (2) at 261. Unless the necessity or intractability of language in a legislation dictates otherwise, it is the duty of a court to give effect to all words contained in the legislation. I can see no characteristics in ss. 11(1). In my opinion, the words 'by way of' are not, and were not intended to be, insignificant in the provision. Those words were intended to, and do, control the meaning to be attached to the word 'relief' preceding them. They have the effect of excluding an injunction and specific performance from the meaning of that word. If the word (relief) were construed to include injunction the subsection would read very oddly, indeed. How can one, I ask, speak of a relief of injunction being granted by way of

injunction? Neither to a lawyer nor to an expert in English language would that statement make any sense. I refuse to reduce the subsection to the rank of absurdity. In my judgment, the prohibition imposed by the subsection was not intended to, and does not, extend to an application, like the instant one in which the relief sought is injunction itself. I would be skipping the words ‘by way of’ in the subsection, as the learned Senior State Attorney appears to have done, to hold that the word ‘relief’ there includes injunction. I can see no warrant for doing so. On the contrary, I am profoundly convinced that both the law and common sense force one to the view that the use of those words was, as I have already, I hope, sufficiently demonstrated, intended to limit the scope of the meaning of the word ‘relief’ in the subsection. It is my duty to attach due weight to the words which Parliament, in its wisdom, has chosen to use. If, in my opinion, Mr. *Mallaba’s* argument on the effect of the subsection were right, personal freedoms and rights would have been placed in great jeopardy, as there would be inadequate judicial protection against unlawful conduct on the part of those who are entrusted with the power of governing this country or determining, non-judicially, the rights of individuals. If that situation were to exist, the rule of law in the country would greatly suffer, with the result that members of the public would be tempted to regard the law as being a series of hazards separating the litigant from justice. The courts must do everything possible under the law to prevent that wrong impression of the law being formed. The law should be there to promote and not impede justice. In this country, a decision or order of a government minister or official, regardless of his or her rank, cannot outweigh the law. To borrow the argument of Lord Woolf in his speech in the *M* case *supra* (at 445H):

... circumstances can occur where it is in the interests both of a person who is subject to powers of government and of the government itself that the courts should be in a position to make an order which clearly sets either what should or what should not be done by the government’.

Any collision between the freedom of the individual and the security of the State, in any sphere of national life, does not, in my considered opinion, dictate the acceptance of Mr. *Mallaba’s* argument. If the law were as contended by the learned Senior State Attorney, justice would have been wearing a bandage over her eyes as she could not bear to see some of the decisions made in her name in that branch of the law. I can find no reason for believing that Parliament could have intended to create such a situation.

Before parting with this application, I should, I think, say a word or two on one important point. Since overruling Mr. *Mallaba's* objection to this Court granting an injunction pending the hearing of the application for leave to apply for *certiorari*, *mandamus* and prohibition on the ground that the court lacked jurisdiction to do so, I have found a passage in the judgment of Lord Woolf in M's case, *supra*, which if I may respectfully say so, plainly demonstrates that the High Court in England has the power to grant an interlocutory injunction pending the hearing of an application for leave to apply for judicial review. The passage, at 463 – 464, reads:

What has been said so far does not mean that Garland J was necessarily in order in granting the injunction. The injunction was granted before he had given the applicant leave to apply for judicial review. However, in a case of real urgency this was, the fact that leave had not been granted is a mere technicality'. It would be undesirable if, in the situation with which Garland J was faced he had been compelled to give leave because he regarded the case as an appropriate one for an Interim injunction. In the case of civil proceedings there is recognition of the jurisdiction of the court to grant interim injunctions before the issue of a Writ, etc. (See Ord. 29, rule (3)) and in an appropriate case there should be taken to be a similar jurisdiction to grant interim injunctions now under Ord. 53. The position is accurately set out in notice 53/1-14/24 to *The Supreme Court Practice 1993* where it is stated that:

Where the case is so urgent as to justify it, (the judge) could grant an interlocutory injunction or other interim relief pending the hearing of the application for leave to move for judicial review. But if the judge has refused leave to move for judicial review he is *functus officio* and has no jurisdiction to grant any form of interim relief. The application for an interlocutory injunction or other interim relief could, however, be renewed before the Court of Appeal along with the renewal of the application for leave to move for judicial review'.

If I may repeat what I ventured to say in my earlier ruling, there is no room for doubt that this Court has the power to grant an interlocutory injunction before hearing an application for leave to apply for a prerogative order.

For the reasons I have given, I am satisfied that the law, justice and common sense dictate that I uphold Mr *Mkono's* contention that s. 11 of the Government Proceedings Act does not stand in the applicant's way in the instant application. Except to autocrats, it must be intolerable

that, in a democratic society like ours, courts should be impotent to grant a temporary injunction in favor of an individual who complains of unwarranted or oppressive use of statutory powers by a government minister or official. It should be made perfectly clear, I think that this Court can halt the bulldozer of the State before it squashes the right of an individual, company or society.

The preliminary point fails.

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

Civil Case No. 214 of 1992

LUJUNA SHUBI BALLONZI, SENIOR

PLAINTIFF

Versus

THE REGISTERED

TRUSTEES OF CHAMA CHA MAPINDUZI

DEFENDANTS

RULING

SAMATTA, J.K.

One of the principal questions I have to decide in this matter is whether the plaintiff (now the respondent), Mr. Lujuna Shubi Ballonzi, Senior, has *locus standi* or standing to bring the action which is now before this Court. In his plaint the respondent has sued the Registered Trustees of **Chama Cha Mapinduzi** (hereinafter referred to by its acronym, CCM), praying for the following reliefs, among others:

- (1) a declaration that CCM is not a political party;
- (2) an order that the defendants be dissolved and liquidated;
- (3) a declaration that the defendants have no rights to movable and immovable properties which they have “purported” to acquire by using subventions from the Consolidated Fund;
- (4) an order that the defendants pay all external debts amounting to not less than seven billion dollars “incurred on behalf of Tanzanians”; and
- (5) a permanent injunction restraining the defendants from using and/or alienating properties in their possession.

In the plaint the respondent avers, *inter alia*:

3. That the Defendants on or about the 5th day of February, 1977, took all assets of the Tanganyika National African Union of Tanganyika and the Afro Shiraz Party of Zanzibar (“The Founder Parties”).

4. That the Founder Parties were, without authority and mandate of the people, receiving subventions, from the Consolidated Fund of Tanzania and compulsory contributions from people residing in Tanzania and others doing business with Tanzania and used those moneys to acquire movable and immovable properties which were then registered in their respective names. ALTERNATIVELY the founder parties should have used those funds prudently for the benefit of all Tanzanians.
5. The Defendants without the authority and mandate of the people of Tanzania constituted themselves a State party on or about the 5th day of February, 1977, and continues to receive and use funds from the Consolidated Fund and compulsory contributions aforesaid in the same manner as the Founder Parties until the 30th day of June, 1992.
6. That the Defendants are continuing to coerce the business community to contribute to them funds by using their position as a de facto government. These funds can only be received for and on behalf of all Tanzanians.
7. That the Defendants, without the authority and mandate of Tanzanians, transferred to themselves assets that they had acquired from the Founder Parties and registered them in their names and further acquired other properties from the subventions referred to in paragraph 5 herein and registered them in their names.
8. That the Defendants have no right to the properties referred to in para 7 herein because these properties were purchased, acquired and/or constructed from funds which belonged to the peoples of Tanzania the overwhelming majority of whom are not members of the Defendants and therefore can hold such properties as trustees of the people of Tanzania and not as Trustees of CCM.
9. The Plaintiff has never been a member of the Founder Parties and CCM but has contributed to the funding of the Consolidated Fund through payment of taxes and has been forced on several occasions to contribute towards CCM which moneys have found their way in the coffers of the Defendants.
10. It is estimated that the Defendants have accumulated properties worth shillings seven hundred and eighty billion (TTshs. 780,000,000,000/=) from State funds and have used one trillion shillings (TTshs. 1,000,000,000,000/=) to activities unrelated to welfare of Tanzanians and have through mismanagements, outright theft and autocracy incurred an external debt of dollars seven billion (7,000,000,000/=) ostensibly on behalf of Tanzanians but without the authority and mandate of the people.

11. That on the 1st day of July, 1992, the Defendants have in an autocratic manner constituted themselves as a political party and continue to cling on properties referred to in para 7 herein as theirs and have shown no intention to return them to the Government of the United Republic of Tanzania despite demand.

12. ...

13. ...

14. ...

15. For purposes of jurisdiction and court fees the value of the subject matter of the suit is in excess of four trillion shillings (4,000,000,000,000/=)”.

I have decided to quote the averments in the plaint *in extenso* because of the unusual character of the case. The Defendants (now the applicants) have filed, under Order VI, rule 16 and S. 95 of the Civil Procedure Code (the Code) and S. 2(2) of the Judicature and Application of Laws Ordinance, Cap. 453 an application in which they pray that the plaint be struck out on one or more of the following grounds:

- (1) it discloses no reasonable cause of action;
- (2) it is scandalous, frivolous and vexatious; and
- (3) it is an abuse of the process of the Court.

The application was heard *ex parte* because, although he was duly served with notice of hearing, the respondent, who was not legally represented, did not appear at the hearing.

Mr. Uzanda (who was assisted by Ambassador Rutakyamirwa and Miss Mjasiri) strenuously attacked, from several fronts, the respondent's right in law to bring his action against the applicants. The learned advocate contended that the suit is incompetent for not disclosing a cause of action and for being scandalous, frivolous and vexatious and an abuse of the process of this court. He advanced four grounds in support of that contention. Those grounds may, without doing any injustice to the very skilful manner in which the learned advocate put forward his arguments, be summarized as follows:-

- (1) The purported representative suit is incompetent because the mandatory provisions of Order 1, Rule 8 of the Code have not been complied with.
- (2) The suit is incompetent in law because no cause of action on trust has been disclosed by the plaint.

- (3) Assuming that the respondent has (properly) pleaded a trust, the non-compliance with the provisions of S. 67 of the Code is fatal to the suit.
- (4) Since the case is based on averments that the applicants were receiving subventions from the Consolidated Fund, the suit should have been instituted against the Government and not against the Applicants. In any case, the payment of those funds is not a justifiable issue or one which is subject to review by the courts.

In this country, *locus standi* is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court: see Halsbury's Laws of England, 4th ed., para. 49 at p. 52. Courts do not have power to determine issues of general interest: see *Re I.G. Farbenindustrie A.G. Agreement* [1943] 2 All ER 525. They can only accord protection to interests which are regarded as being entitled to legal recognition. They will thus not make any determination of any issue that is academic, hypothetical, premature or dead. Because a court of law is a court of justice and not an academy of law, to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application. Of course, provided the interest is recognized by law, the smallness of it is immaterial. It must also be distinctly understood, I think, that not every damage or loss can be the subject matter of court proceedings. The maxim *damnum sine injuria esse potest* (there may be damage or loss inflicted without any act being done which the law deems as injury is, without any shadow of doubt, part of the law of this country. An example of *damnum absque injuria* (loss without a wrongful act) is where a man sets up a shop in order to attract the customers of another shop. In *Gregory and An v. London Borough of Camden* [1967] 2 All ER 196, at p. 203 G – H, PAUL., J., describes the common law principle in these terms:

There are many acts which cause loss which give no legal rights. Before one can come to a court of law, one must suffer an *injuria* as well as *damnum*; one must have suffered a legal wrong as well as an actual loss of money or amenity or something else.

Under S. 2(2) of the Judicature and Application of Laws Ordinance, Cap. 453, this Court has, of course, power to modify the common law so as to make it suit local conditions. Commenting on identical power conferred on the High Court of East Africa by the proviso to Article 15 of the East Africa Order in Council (S.R. & O.1902 No. 661) as amended by the East Africa Order in Council of 1911, in *Nyali Ltd. v. Attorney-General* [1955] 1 ALL ER 646 DENNING L.J. said, at p. 653.

The ... proviso says, however, that the common law is to apply "subject to such qualifications as local circumstances render necessary". This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.

In this country, is there any logical basis for modifying the common law rule of *locus standi*? In India the Supreme Court has widened that rule. The new approach there is described by Mr. Justice P.N. Baghwati, a former Chief Justice of that country, in his article *Fundamental Rights in their Economic Social and Cultural Context*, published in DEVELOPING HUMAN RIGHTS JURISPRUDENCE, Vol. 2 at p. 83, in the following terms:

... there was difficulty in enforcing the human rights of the poor and the disadvantaged, because they are not aware of their rights, they lack the capacity to assert those rights and they do not have the material resources to approach the courts in cases other than criminal. As a result of a large range of human rights remain unenforced. We therefore developed the strategy of public interest litigation. We held in a seminal decision that the ordinary rule of Anglo-Saxon jurisprudence is that an action can be brought only by a person to whom legal injury is caused. However, this rule must be departed from in the cases of poor and disadvantaged classes of people where legal injury is caused to a person

or class of persons who, by reason of poverty or disability or socially or economically disadvantaged position, cannot approach the courts for judicial redress. Thus we held that any member of the public, or social action groups acting bona fide, can approach the court seeking judicial redress for the legal injury caused to such person or class of persons, and that in such a case the court will not insist on a regular petition being filed by the public spirited individual or social action group espousing their cause and will readily respond – even if its jurisdiction is invoked merely by means of a letter addressed to it, as can happen in the case of habeas corpus actions. This widening of the rule of *locus standi* introduced a new dimension in the judicial process and opened a new vista of a totally different kind of litigation for enforcing the basic human rights of poor and underprivileged sections of the community, and ensuring basic human rights dignity. Much of the human rights jurisprudence in India has been built up by the courts as a result of public interest litigation. The courts have been enforcing basic human rights of the deprived and vulnerable sections of the society in cases under trial as well as convicted prisoners, women in distress, children in jails and juvenile institutions, bonded and migrant workmen, unorganized labour “untouchables” and “scheduled tribes”, landless agricultural labourers who are denied minimum wages or who are victims of faulty mechanization, slum and pavement dwellers and victims of extra-judicial executions and many more”.

If I may respectfully say so, there is, I think, some justification for extending the rule of *locus standi* in the direction taken by the Supreme Court of India. The provisions of Article 26(2) of the Constitution of the United Republic of Tanzania (the Constitution) do not seem to extend the rule to the degree done by the Supreme Court of India). Bearing in mind the realities of our society, including the comparable educational backwardness and poverty of the majority of the people, I would respectfully agree with the following observations by Mr. Justice Kayode, a former Justice of the Supreme Court of Nigeria, made in his article *The Role of the Judge in Advancing Human Rights* in DEVELOPING HUMAN RIGHTS JURISPRUDENCE, VOL. 3, AT P. 100:

It is submitted that the greatest excuse of the advocate of restraint in *locus standi* is that there would be floodgate if everyone is given hearing in (Human Rights cases). No one would advocate floodgate in ordinary cases, but as has been submitted earlier, human rights are special rights and special rights deserve special treatment. If floodgate it entails, let there be one, once it is a matter of human rights”.

An ordinary person is likely to be more conversant with his private law rights than with his public law rights. By necessity the rule of *locus standi*, in so far as it relates to human rights litigation, must be wide. I can see no warrant for making similar extension to the rule as far as private interest litigation is concerned. Since I do not think it would be right to consider the respondent's suit as falling under the purview of human rights litigation, I proceed, being guided by, among others, the cases I have cited *supra*, to consider the merits or otherwise of Mr. Uzanda's submissions.

Although in the plaint he does not expressly say so, it is as plain as a pikestaff that the respondent has purported to file the suit not only on his own behalf but also on behalf of all Tanzanians who are not members of CCM. As already indicated, Mr. Uzanda contends that the suit is incompetent in law on the ground that the provisions of Order 1, Rule 8 of the Code have not been complied with. I have no doubt that this contention is unanswerable. Rule 8 of Order 1 reads:

8 – (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit”.

This rule is almost *in pari materia* with Order 1, Rule 8(1), (2) and (3) of the Civil procedure Code of India. Commenting on the latter rule, the learned authors of Sir John Woodroffe and Ameer Ali's CODE OF CIVIL PROCEDURE, 3rd ed., Vol. II, state as follows, at p. 1403:

The foundation of Order 1, rule 8 CPC is to be found in a principle which transcends the personal or parochial nature of the combatants who are arrayed as parties to the suit. It affects the rights of other persons not present before the court. Hence a duty is cast on the court itself to follow meticulously the procedure prescribed by Order 1, rule 8. In view of the far reaching consequences of a decree passed in what is described in law as a representative suit, it is necessary that the relevant provisions must be treated as peremptory and mandatory”.

And at p. 1405, the learned authors state as follows:

A representative suit cannot be said to have been validly instituted unless and until the mandatory provisions of Order 1 rule 8 of the Civil Procedure Code are complied with. The provision contained in Order 1, rule 8, CPC. ... is mandatory and not merely directory and is an essential pre-condition for the trial of the case as a representative suit. It is imperative that the two conditions provided in rule 8 of Order 1, should be complied with, namely, (1) the permission of the Court should be obtained and (2) the court should, at the expense of the plaintiffs, issue notice of the institution of the suit to all such persons either by personal service or where from the number of persons, or any other cause such service is not reasonably practicable, by public advertisement, as the court may direct”.

In my view, these two passages also accurately state our law. A person cannot seek to advance the claims of a group of persons without adopting the procedure laid down in rule 8 of Order 1 of the Code. He cannot, as the respondent in the case now before me has purported to do, institute a representative suit without first obtaining leave of the court to bring such suit. When such suit is instituted without that leave, it must be struck out for being incompetent in law. Common interest litigation can be conducted only in accordance with the provisions of Order 1, rule 8 of the Code. As already remarked, failure to comply with those mandatory provisions is fatal to any such suit or application. This is, in law, a sufficient ground for striking out the respondent’s purported representative suit.

As was very rightly pointed out by Mr. Uzanda in his submission, nowhere in his plaint has the respondent asserted that, as a result of the applicants’ alleged misconduct, he has suffered special damage over and above other Tanzanians or millions of Tanzanians who are not members of CCM. It is a principle of the law of this country that public rights can only be asserted in a *civil action* by the Attorney General as the guardian of the public interest. Except where statutory provisions provide otherwise, a private person can only bring an action to restrain a threatened breach of the law if his claim is based on an allegation that the threatened breach will constitute an infringement of his private right or will inflict special damage on him. What, as far as common law is concerned, are authorities for these propositions? To answer that question, I would cite *Attorney-General (on the relation of McWhirter v. Independent Broadcasting Authority* [1973] 1 all ER 689 and *Gouriet v. Union of Post Office Workers and Others* [1977] 3 All ER 70,

two of the cases Mr. Uzanda referred me to in the course of his very attractive submission. I do not consider it necessary to go into the facts of those cases. Both cases concerned the scope of the common law general principle that a private person is not entitled in law to bring an action in his own name for the purpose of preventing or seeking compensation for public wrongs. In the former case, LORD DENNING, M.R., said, at p. 696:

If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the court and draw the matter to its attention? He may himself be injuriously affected by the breach. So may thousands of others like him. Is each and every one of them debarred from access to the courts? The law is clear that no one of them can bring an action for damages, unless he has suffered special damage over and above everyone else. That was settled in 1535 in a case in the Year Books. That rule was laid down in order to avoid multiplicity of actions. The argument was put in this way: 'If one of those injured were allowed to sue, a thousand might do so: and that was considered intolerable. Sir William Blackstone in his commentaries said:

'... it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects.'

But does this rule – which prevents anyone suing for damage – also prevent any member of the public from seeking a declaration or an injunction? (These) are discretionary remedies, to which no one has a right, but which the court can grant if it thinks fit. The usual course, no doubt, is for the member of the public who is aggrieved to go to the Attorney-General and ask him to intervene – either *ex officio* or by granting leave to use his name in a relator action. In all proper cases the Attorney-General will, no doubt, give his leave. But it is a matter for his discretion.

The Master of the Rolls then went on to consider whether the aggrieved member of the public had any access to court if the Attorney-General unreasonably refused to give the leave sought. He answered the question in the affirmative. In the course of giving that answer, he made, if I may respectfully say so, very helpful observations on the role of the Attorney-General in this respect. He said, at p. 697:

It is settled in our Constitutional law that in matters which concern the public at large the Attorney-General is the guardian of public interest. Although he is a member of the government of the day, it is his duty to

represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law.

His duty has been thus stated by members of this court who, each in his turn, had held the office of Attorney-General. In 1879 in *Attorney-General v. Great Eastern Railway Co.* (1870) 11 Ch. D449 at 500 Baggalay L.J. said:

‘It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed ... it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues ex officio, at the instance of relators.’

In 1924 Sir Ernest Pollock MR repeated those very words with approval: see *Attorney-General v. Westminster City Council* [1924] All ER Rep. 162 at p. 165. To these I would add the words of Lord Abinger CB who had himself been Attorney-General in *Deare v. Attorney-General* (1835) IX & C Ex 197 at 208:

... it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred.

In *Gouriet’s case supra*, LORD WILBERFORCE analysed the common law principle at great length. In the course of his judgment, he said, at p. 80:

It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of Constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown, and just as the Attorney-General has in general no power to interfere with the assertion of private rights, so *in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.* (the emphasis is supplied)

And at p. 83 b – c, his Lordship said:

That it is the exclusive right of the Attorney-General to represent the public interest, even where individuals might be interested in a larger view of the matter, is not technical, not procedural, not fictional. It is Constitutional. I agree with Lord Westbury LC that it is also wise.

Do the provisions of Article 26(2) of the Constitution entitle the respondent to bring the action now before this court? I think not. In the first place, in his plaint the respondent has not complained of unconstitutionality or illegality. Although he is a lawyer by profession, he has not cited any provision of the Constitution or any other law which has been violated by the applicants. This omission is, in my view, a matter of no surprise. The respondent could not have made such citations because under the Constitution and law then in force no unconstitutionality or illegality could arise in the applicants receiving from the Government the moneys they are said to have received on behalf of CCM, or in the government making those disbursements. I will be forgiven, I hope, for stating the obvious, namely, the Constitutionality or legality of yesterday's actions cannot be tested by today's Constitution or law. Secondly, it is my considered view that those provisions were not intended to, and do not, abolish the application in Tanzania of the common law principle that a private person cannot assert rights belonging to the public. In my judgment, they merely reduce the scope of the rule. As far as public nuisance and public charity are concerned, two or more private persons may, under S. 66 and 67 of the Code respectively, bring a relator action. But to do so, those persons must obtain the consent of the Attorney-General: see *Tricumdass Mulji and An v. Khimji Vullabndass and Others* (1892) 16 Bom. 626 and *Lutifunnissa Bibi and Others v. Nazirun Bibi* (1885) 11 Cal 33. The provisions of those two sections are mandatory; suits to which the sections apply can only be instituted in accordance with their provisions. It cannot be denied that the instant suit has not been instituted in compliance with the provisions of S. 67. It may well be – and I stress that I say no more than that – that the trustees of a political party can, in law, seek from this Court some of the reliefs the respondent has purported to pray for in the instant case.

Lastly, I must deal with Mr. Uzanda's submission concerning subventions which were being made to the applicants. I am not disposed to think that all the issues raised by the respondent in his plaint are not justiciable. Some of those issues can, in my opinion, be properly examined in courts of law provided they are raised by a party having *locus standi*. Whether CCM is a properly registered political party, for example, is plainly a question of law, whose answer must lie in the Constitution and the Political Parties Act. Nevertheless, I agree with the learned advocate's submission that the remedy, if any, for any wrong allegedly committed in relation to subventions received by the applicants does not lie in the judicial field. In general, the management of public funds, like the

management of the economy and foreign policy of the country, is the prerogative of the executive; it is not amendable to judicial process. In the exercise of its powers in that field the executive is accountable to Parliament. It would be straining to the utmost the power of judicial innovation to say that in the exercise of its powers in that area the executive falls under judicial superintendence or scrutiny. Generally speaking, judicial process is unsuitable for determining issues arising from the exercise of those powers. I find considerable support for that proposition in the observations made by LORD DIPLOCK in *Council of Civil Service Unions and Others v. Minister for the Civil Service* (1985) 1 AC 374, albeit in a somewhat different context. At p. 411 his Lordship said:

... The reasons for the decision – maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer; by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another – a balancing exercise which judges by their upbringing and experience are ill-qualified to perform.

An assertion that the exercise of every governmental power is subject to judicial scrutiny would not be a sustainable proposition.

Judging from what he avers in his plaint, Mr. Ballonzi, Senior, feels very strongly about the weaknesses of the political system which existed in this country before the multi-party system was adopted a few years ago, but the law regards him as lacking status to maintain the proceedings he has instituted before this court. While he may deserve commendation for his vigilance in support of democracy, the applicants have demonstrated to my satisfaction that his suit has not been properly framed and some of his causes of action are incontestably bad in law. The suit will not lie.

The application is granted and the suit is, under S. 95 of the Civil Procedure Code, struck out. The applicants will have their costs.

Sgd:

B.A. Samatta

JAJI KIONGOZI

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

Civil Case No. 206 of 1993

MWALIMU PAUL JOHN MHOZYA

PLAINTIFF

Versus

THE ATTORNEY GENERAL

DEFENDANT

RULING

SAMATTA, J.K.

This is an application for an interlocutory injunction restraining His Excellency Ali Hassan Mwinyi, the President of the United Republic of Tanzania, from discharging Presidential functions pending the determination of Civil Case No. 206 of 1993, filed in this Court, in which the applicant seeks, *inter alia*, the following declarations:-

- (1) The Constitution of the United Republic of Tanzania, hereinafter referred to as “the Constitution”) was violated by Zanzibar joining an organization known as Islamic Conference Organization.
- (2) The President is guilty of allowing or enabling that violation to take place and is therefore personally answerable for the violation.
- (3) His Excellency Ali Hassan Mwinyi’s continued exercise of Presidential powers is unconstitutional as well as a potential danger to the well-being of the United Republic and its citizens.

The application has been strenuously opposed by Mr. Salula, Senior State Attorney, on behalf of the respondents. Although he is a teacher by profession, the applicant, who appeared in person at the hearing, has argued the application, including legal issues, with much confidence.

At the hearing Mr. Salula raised a preliminary objection to the application. He based the objection on three principal grounds. These are:-

The application is incompetent because the affidavit sworn and filed by the applicant in support of it is fatally defective in that it does not comply with the provisions of Order XIX rule 3(1) of the Civil Procedure Code.

The application contravenes Article 46A of the Constitution in that it attempts to move the court to do an act in respect of which Parliament has provided a special and entirely different procedure. In other words, this Court does not have jurisdiction to make the order sought by the applicant.

The provisions of S. 11(2) of the Government Proceedings Act, 1967, and those of Order XXXVII rule 2 of the Civil Procedure Code as amended by the Government Proceedings (Procedure) Rules, 1960 (Govt. Notice No. 376 of 1968) prohibit the granting of the kind of injunction sought in this application.

In performing my task in the instant application I must make it perfectly clear that I bear in mind, *inter alia*, the following principles:-

1. A court will not be deterred from a conclusion because of regret at its consequences:- *Hornal v. Neuberger Products Ltd.* (1956) 3 All ER 970 at 978.
2. It is wrong for a court of law to be anxious or to appear to be anxious to avoid treading on executive toes.
3. A Constitution is a living instrument which must be construed in the light of present day conditions. The complexities of our society must be taken into account in interpreting it. A workable Constitution is a priceless asset to any country.
4. A Constitution should be given a generous and purposive construction: *Attorney-General of the Gambia v. Momodou Jobe* (1984) 3 WLR 174. Respect must, of course, be paid to the language used in the instrument.
5. The balance of power between the three branches of government, namely, the executive, the legislature and the judiciary, and the relationship of the courts to the other two branches must be carefully maintained. Any statutory alteration of that balance must be in unmistakable terms. One branch of government should not usurp the powers of another branch.
6. The notion, apparently harboured by some people in this country, that the President of the United Republic is above the law is subversive of the Constitution and the laws. All Government leaders, including the President, are, like the humblest citizen, bound to comply with the laws of this country. The maxim 'The King can do no wrong' has no place in our law even if the word

‘President’ is substituted for the word ‘King’. Everyone and every institution or organization in the country is enjoined to pay respect to the principle of supremacy of the law. See Article 26(1) of the Constitution.

7. Flexibility in the application of procedural law is a desirable thing, for it assists to ensure that at the end of the day justice triumphs. When it comes to the issue of compliance with rules of procedure, the instinct for strictness should, where appropriate, be subdued. Substance rather than form should be the courts’ primary concern.

Having stated the above principles, I turn now to consider Mr. Salula’s preliminary objection. I propose to start with the argument concerning the applicant’s affidavit. As will be recalled it was the learned Senior State Attorney’s contention that the affidavit is defective for non-compliance with the provisions of Order XIX rule 3(1) of the Civil Procedure Code. Order XIX rule 3(1) provides:

- 3.- (1) Affidavit shall be confined to such facts as the deponent is able of his knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted:

Provided that the grounds thereof are stated.

It cannot be argued, and the applicant, if I understood him correctly as I believe I did, did not venture to argue that the supporting affidavit in this application strictly complied with the above quoted provisions of the Civil procedure Code. I would not, on that ground alone, however, drive the applicant from the judgment seat in this application. It is the function of a court of justice to try to get to the bottom of the real dispute and to determine what are the real issues in the matter before it provided, of course, no party can be prejudiced. As already remarked, substance rather than form should be the courts’ primary concern. If legal steps can be taken to cure any defects in a pleading or an affidavit, without substantially prejudicing the opposite party, a court of justice should grant leave to the party to take those remedial steps, if he so wishes. I would call attention to the celebrated words of LORD COLLINS, M.R., in *Re Cloes and Ravenshear* (1907) 1 KB at p. 4:

Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by the rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

If I will be satisfied that this court has jurisdiction to grant the relief sought by the applicant, I will be prepared to grant leave to him to take remedial steps. I now turn, therefore, to the question whether this court has that jurisdiction.

Mr. Salula's submission on this point was that, as the Constitution contains specific provisions governing how and under what circumstances a person holding the office of the President of the United Republic will cease, temporarily or otherwise, to hold that office, the suspension or removal of such a person from office is not by way of judicial process. In support of that submission the learned Senior State Attorney cited Article 42(2) and (3) of the Constitution as read with Article 46A of the same legislation. Countering that argument, the applicant contended, among other things, that Article 26(2), 30(3) and 108(2) of the Constitution, whether read together or separately, empower this court to grant the temporary injunction sought. Article 42(2) and (3) of the Constitution reads as follows:

42-(1)

(2) Unless he sooner resigns or dies, a person elected as President shall, subject to subsection (3) of this section, hold office for a term of five years from the date on which he is elected President.

(3) A person elected President shall hold the office of President until:-

- (a) the day when his successor in office takes the oath of office; or
- (b) the date when he does in office; or
- (c) the day of his resignation from that office; or
- (d) he ceases to hold the office of President in accordance with the provisions of this Constitution.

Article 46A provides as follows in Swahili:

46A.-(1) Bila ya kujali masharti ya ibara ya 46 ya Katiba hii, Bunge linaweza kupitisha azimio la kumuondoa Rais madarakani endapo itatolewa hoja ya kumshtaki Rais na ikapitishwa kwa mujibu wa masharti ya ibara hii.

(2) Bila ya kuathiri masharti mengineyo ya ibara hii, hoja yoyote ya kumshtaki Rais haitatolewa isipokuwa tu kama inadaiwa kwamba Rais –

- (a) ametenda vitendo ambavyo kwa jumla vinaivunja Katiba;

- (b) ametenda vitendo ambavyo vinakiuka maadili yanayohusu uandikishwaji wa vyama vya siasa yaliyotajwa katika ibara ya 20(2) ya Katiba; au
 - (c) amekuwa na mwenendo unaodhalilisha kiti cha Rais wa Jamhuri ya Muungano, na haitatolewa hoja ya namna hiyo ndani ya miezi kumi na miwili tangu hoja kama hiyo ilipotolewa na ikakataliwa na Bunge.
- (3) Bunge halitapitisha hoja kumshitaki Rais isipokuwa tu kama –
- (a) taarifa ya maandishi, iliyotiwa sahihi na kuungwa mkono na Wabunge wasiopungua asilima ishirini ya Wabunge wote itawasilishwa kwa Spika siku thelathini kabla ya kikao ambapo hoja hiyo inakusudiwa kutolewa Bungeni, ikifafanua makosa aliyoyatenda Rais, na ikipendekeza kuwa Kamati Maalum ya uchunguzi iundwe ili ichunguze mashtaka yaliyowasilishwa dhidi ya Rais;
 - (b) wakati wowote baada ya Spika kupokea taarifa iliyotiwa sahihi na Wabunge na kujiridhisha kuwa masharti ya Katiba kwa ajili ya kuleta hoja yametimizwa Spika atamruhusu mtoa hoja kuiwasilisha hoja hiyo, na kisha Spika atalitaka Bunge, bila ya kufanya majadiliano, lipige kura juu ya hoja ya kuunda Kamati ya Uchunguzi na kama ikiungwa mkono na Wabunge wasiopungua theluthi mbili ya Wabunge wote, atatangaza majina ya wajumbe wa kamati Maalum ya Uchunguzi.
- (4) Kamati Maalum ya Uchunguzi, kwa madhumuni ya ibara hii, itakuwa na wajumbe wafuatao, yaani –
- (a) Jaji Mkuu wa Jamhuri ya Muungano, ambaye atakuwa ndiye Mwenyekiti wa Kamati;
 - (b) Jaji Mkuu wa Zanzibar; na
 - (c) Wabunge saba walioteuliwa na Spika kwa mujibu wa Kanuni za Bunge na kwa kuzingatia uwiano wa uwakilishi baina ya vyama vya siasa vinavyowakilishwa Bungeni.

(5) Endapo Bunge litapitisha hoja ya kuunda Kamati Maalum ya uchunguzi, Rais atahesabiwa kuwa hayupo kazini, kisha kazi na madaraka ya Rais yatatekelezwa kwa mujibu wa masharti ya ibara ya 37(3) ya Katiba hii hadi Spika atakapo mfahamisha Rais juu ya azimio la Bunge kuhusiana na mashtaka yaliyotolewa dhidi yake.

(6) Ndani ya siku saba baada ya Kamati Maalum ya uchunguzi Kuundwa, itakaa ichunguze na kuchambua mashtaka dhidi ya Rais, pamoja na kumpatia Rais fursa ya kujieleza, kwa kufuata utaratibu uliowekwa na Kanuni za Bunge.

(7) Mapema iwezekanavyo, na kwa vyovyote vile katika muda usiozidi siku tisini, Kamati Maalum ya Uchunguzi itatoa taarifa yake kwa Spika.

(8) Baada ya Spika kupokea taarifa ya Kamati Maalum ya Uchunguzi, taarifa hiyo itawasilishwa Bungeni kwa kufuata utaratibu uliowekwa na Kanuni za Bunge.

(9) Baada ya taarifa ya Kamati Maalum ya Uchunguzi kuwasilishwa kwa majibu wa ibara ndogo ya (8), Bunge litajadili taarifa hiyo na litampa Rais fursa ya kujieleza, na kisha, kwa kura za Wabunge wasiopungua theluthi mbili ya Wabunge wote, Bunge litapitisha azimio ama kuwa mashtaka dhidi ya Rais yamethibitika, na kwamba hastahili kuendelea kushika kiti cha Rais, au kuwa mashtaka hayo hayakuthibitika.

(10) Endapo Bunge litapitisha azimio kuwa mashtaka dhidi ya Rais yamethibitika na kwamba hastahili kuendela kushika Kiti cha Rais, Spika atawafahamisha Rais na Mwenyekiti wa Tume ya Uchaguzi juu ya azimio la Bunge, na hapo Rais atawajibika kujiuzulu kabla ya kuisha kwa siku tatu tangu Bunge lilipopitisha azimio hilo.

(11) Endapo Rais atacha kushika Kiti cha Rais kutokana na mashtaka dhidi yake kuthibitika, hatakuwa na haki ya kupata malipo yoyote ya pensheni ana kupata haki au nafuu nyinginezo alizo nazo kwa mujibu wa Katiba au Sheria yeyote iliyotungwa na Bunge.

The provisions of the Constitution which were the main-stay of the applicant's contention that this court has the jurisdiction to make an injunction order which has the effect of suspending the President of the United Republic from office read as follows:-

Article 26(2)

Every person is entitled, subject to the procedure provided by the law, to institute proceedings for the protection of the Constitution and legality.

Article 30(4)

Subject to the other provisions of this Constitution, the High Court shall have and may exercise original jurisdiction to hear and determine any matter brought before it in pursuance of this section; and an Act of Parliament may make provision with respect to –

- (a) the procedure regulating the institution of proceedings under this section;
- (b) the powers, practice and procedure of the High Court in relation to the hearing of proceedings instituted under this section;
- (c) ensuring the more efficient exercise of the powers of the High Court, the protection and enforcement of the basic rights, freedom and duties in accordance with this Constitution.

Article 108(2)

Where it is not expressly stated in this Constitution or in any other legislation that any specific matter shall be first heard and determined in a certain court, the High Court shall have jurisdiction to hear and determine that matter. In addition, the High Court shall have jurisdiction in respect of any other matter which, in accordance with legal traditions and conventional practice obtaining in Tanzania is ordinarily to be heard and determined by the High Court; save that, the provisions of this section shall apply subject to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other legislation.

I have given careful and earnest consideration to the competing arguments addressed to me on the issue of jurisdiction and in the end I am satisfied that Mr. Salula's argument is sound in law. The principle that one branch of government should not encroach on the functions of another branch is a very important principle, one of the principles which ensure that the task of governing a State is executed smoothly and peacefully.

It seems to me to be an incontrovertible proposition of law, having regard to the use of the words "in accordance with the provisions of this Constitution" in Article 42(3) (d) of the Constitution, that removal or suspension from office of the President of the United Republic is the legislature's exclusive prerogative. Since Article 46A of the Constitution lays down the procedure to be used in removing or suspending the President, the attempt to remove or suspend him by a procedure other than that would not be legal. If Parliament had intended this Court to exercise concurrent jurisdiction of dealing with politico – Constitutional offences it could easily have said so when enacting Article 46A of the Constitution. The omission to provide

such a provision in the Constitution would appear to strongly suggest that the Constituent Assembly did not want judicial process to be used in removing or suspending the President from office. It is not for this Court to say whether or not that was a wise decision. None of the Articles of the Constitution cited by the applicant compels me to hold a different view. The right granted by Article 26(2) to institute proceedings for the protection of the Constitution and legality cannot, in my considered opinion, be regarded as providing an authority to this court to grant a relief which, according to the Constitution itself, is a remedy available only through a Parliamentary procedure. As regards Article 30(4), the following can be said: the subsection deals with the subject of limitations upon and the enforcement and protection of basic rights and duties. No issue concerning basic rights arises in the instant application. With regard to enforcement of duties, it can be said without inaccuracy, I think, that that matter does not authorize the court to hold that the President can be removed or suspended from office in a manner other than that which the Constitution has specifically provided for. As for Article 108(2), let me say without ambiguity that I know no legal traditions or conventional practices which authorize this Court to try alleged politico – Constitutional offences, and the applicant cited none in his argument. It may well be (and I say no more than that, because the issue is not before me at this stage of the case) that the Court has jurisdiction to give a declaratory judgment as to the commission or otherwise of such offences, but I will, I hope, be forgiven for stating the obvious, namely, that a temporary injunction and a declaratory judgment are two different things.

But under the common law does this Court not have the jurisdiction to grant the injunction sought by the applicant? I can, I think, answer that question very briefly. Under the common law (the Crown Proceedings Act, 1947, reaffirmed the rule) no injunction can lie against the Crown: see S.A. de Smith; *Judicial Review Administrative Action*, 2nd ed., pp. 461 – 462; Halsbury's Laws of England, 4th ed., para, 168, p. 161. It follows from this position that under that law this Court could not have jurisdiction to issue an injunction against the President. In any case, any rule of common law granting this Court such a jurisdiction would, by necessary implication, have been abolished in this country by the provisions of Articles 42 and 46A of the Constitution.

While paying due respect to the applicant's gallantry, I have, for the reasons I have given, reached a clear conclusion that this Court

lacks jurisdiction to grant the relief sought by the applicant in this application. This conclusion renders it unnecessary to decide whether, as was strenuously contended by Mr. Salula, the provisions of S. 11(2) of the Government Proceedings Act, 1967, and those of Order XXXVII rule 2 of the Civil procedure Code as amended by the Government Proceedings (procedure) Rules, 1968, stand in the applicant's way in the instant application.

The point taken *in limine* succeeds and the application for interlocutory injunction is dismissed.

Sgd:

B.A. Samatta

JAJI KIONGOZI

IN THE HIGH COURT OF TANZANIA
AT DAR-ES-SALAAM

Misc. Civil Application No. 1 of 1995
22 May, 1995 – Dar es Salaam

TANZANIA AIR SERVICES LIMITED

Versus

MINISTER FOR LABOUR, ATTORNEY GENERAL

And

THE COMMISSIONER FOR LABOUR

(Samatta, J.K.)

Cases referred to:

1. *Breen v. Amalgamated Engineering Union and Others* [1972] 2 B 175.
2. *R v. Gaming Board for Great Britain, ex-parte Benaim and Khaida* [1970] 2 All ER 528.
3. *Nyali Ltd v. Attorney General* [1955] 1 All ER 646.
4. *Healey v. Ministry of Health* [1954] 2 All ER 580.
5. *R v. Medical Appeal Tribunal* [1957] 1 All ER 796.
6. *Taylor v. National Assistance Board* [1957] 3 All ER 703.
7. *Tehrani and Another v. Rostron* [1972] 1 QB 187.
8. *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694.
9. *Huth v. Clarke* [1890] 25 QBD 391.
10. *Gordon, Dadds & Co v. Morris and Others* [1945] 2 All ER 616.
11. *Manton v. Brighton Corporation* [1951] 2 All ER 101.

L. Kalunga, for the applicant.

P. Mwidunda, Senior State Attorney, for the respondents.

SAMATTA JK:

In one of his well-known books, *The Road to Justice*, Sir Alfred Denning discusses the importance of a judge giving reasons for his decision. He states as follows, at 29:

The judge must give reasons for his decision: for by so doing, he gives proof that he has heard and considered the evidence and arguments that have been produced before him on each side: and also that he has not taken extraneous considerations into account. It is of course true that his decision may be correct even though he should give no reasons for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reasons; and that can only be seen if the judge himself states his reasons. Furthermore if his reasons are at fault, then they afford a basis on which the party aggrieved by his decision can appeal to a higher court. No judge is infallible, and every system of justice must provide for an appeal to a higher court to correct the errors of the judge below. The cry of Paul J “appeal unto Caesar” represents a deep-seated human response. But no appeal can properly be determined unless the appellate court knows the reasons for the decision of the lower court. For that purpose, if for no other, the judge who tries the case must give his reasons.

In the application now before me I have to determine whether in making his decision on a reference to the Minister for Labour (the Minister) under s. 26 of the Security Employment Act 1964, Cap. 574 (the Act), the Labour Commissioner (the Commissioner), who exercises powers delegated to him by the Minister under s. 44, is under obligation in law to give reasons. The application, by way of chamber summons, is for an order of *certiorari* to bring up and quash the Labour Commissioner's decision by which he confirmed a decision reached by the Conciliation Board of Dar es Salaam that the respondent, whose services with his employer, the applicant company, were terminated, be re-instated. The reference to the Minister consisted of a two-page document in which the Board's decision was strenuously attacked. The Commissioner's decision, which was communicated to the applicant company on Form 8, was couched, when translated, in the following words: 'In accordance with s. 26(2) of the Security of Employment Act, 1964, I confirm the decision of the Conciliation Board. The employee should be re-instated'. Not a single reason was given for this decision. Section 27(1) of the Act makes a decision of the Minister under s. 26 final and conclusive. The subsection reads as follows:

27. – (1) The decision of the Minister on a reference to him under s. 26, and, subject to any decision on a reference to the Minister therefrom, the decision of a Board on a reference to it under this Part –

- (a) shall be final and conclusive; and
- (b) shall be binding on the parties to the reference, and the relationship between the parties in consequence of the matters in respect of which the reference was made shall be determined accordingly; and
- (c) may be enforced in any court of competent jurisdiction as if it were a decree’.

Mr. Kalunga, for the applicant company, strenuously attacked the Commissioner’s decision. He contended that the failure by the Commissioner to give reasons for the decision makes it a nullity. According to the learned advocate, although in the past the decision-maker had no duty under the law to give reasons for his decision, the trend in some common law jurisdictions now is to establish a right to reasons. He went on to submit that to prevent decisions based on caprice or *mala fide*, a right to reasons should be recognized. Mr. *Mwidunda*, Senior State Attorney, representing all the three respondents, opposed the application. Quite rightly, he drew my attention to the fact that there is no provision in the Act imposing a duty on the Minister or Commissioner to give reasons for their decisions made under s. 26 of the Act. According to the learned Senior State Attorney, instead of bringing the present application the applicant should have sought from the Commissioner reasons for his decision. Mr. *Mwidunda* urged me to dismiss the application.

What is the law on this matter? There is, under the common law, no general requirement that public authorities should give reasons for their decisions: see *Breen v. Amalgamated Engineering Union and Others* (1), 190 – 191; *R v. Gaming Board for Great Britain Ex p Benaim and Khaida* (2) In the former case, Lord Denning MR, posed and proceeded to answer the question whether a statutory or domestic body is bound in law to give reasons for its decision. He said, at pp. 190 – 191:

...ought such a body, statutory or domestic, to give reasons for its decision...? Not always, but sometimes. It all depends on what is fair in the circumstances.

The absence in the common law of a general rule requiring a decision-maker to give reasons for his decision has been criticized by Professor H W R Wade in his book *Administrative Law*, 6th ed at 548 where he states as follows:

Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others. "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions."

And at 934 of the same book, the learned author states:

Reasoned decisions are not only vital for the purpose of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself ... [F]or decisions generally a statement of reasons is one of the essentials of justice.

The importance of giving reasons for a decision is also discussed by Geoffrey A Flick in his book *Natural Justice, Principles and Practical Application* in which, at 87 – 88, he says:

... First, the requirement of a reasoned opinion provides considerable assurance that the decision will be better as a result of its being properly thought out. Second, reasons will enable a person who has a right of appeal to determine whether he has good grounds for an appeal and will inform him of the case he will have to meet if he does decide to appeal. In this regard, if an administrative determination is not the result of a unanimous vote of the decision makers, the minority opinion may be of considerable value to an unsuccessful party.... Third, reasons will make a tribunal more amenable to the supervisory jurisdiction of the courts and will ensure that a tribunal is acting within its powers.

That is to say, reasons will inform a person why a decision has been made and will make manifest any errors of law. Fourth, reasoned opinions will encourage public confidence in the administrative process. As was noted in a leading English case, even though a decision may be perfectly correct, if a party was not given reasons he "was left with the real grievance that he was not told why the decision had been made." (*In re Poyser and Mills' Arbitration* [1964] 2QB 478). The exposure to public scrutiny and criticism is healthy Fifth, reasons act as a check on the exercise of discretion and expertise and will ensure that a tribunal was performed its functions of considering relevant factors (*Davies v. Price* [1958] 1 WLR 434), and will prevent arbitrary action: *Donaldson v. Board of Education of North Wildwood* 320 A 2d 857 [1974]. Reasoned opinions

also provide additional guidance to those who advise parties as to their future conduct ...’

I would add that, insofar as natural persons are concerned, giving reasons for a decision constitutes a recognition that the parties are rational beings.

Should I, in determining the instant application, apply the common law as it now stands or should I apply it after modifying it? This Court has, under s. 2(2) of the Judicature and Application of Laws Ordinance, Cap 453, power to vary that law so as to make it suit local conditions. Should I use that power in this matter? I think I should. It seems to me that the interests of justice call for the existence, in common law, of a general rule making it mandatory in matters of importance for public authorities, a term I use to include statutory and domestic bodies, to give reasons for their decisions. But what are matters of importance? It is neither desirable nor possible to define that term but certainly it should be taken to include all matters in which the liberty, livelihood or reputation of the individual is concerned or in which proprietary or pecuniary rights or interests are at stake. In any other situation the decision-maker should be bound to give reasons only if he is requested by a party to do so. In reaching the view that in this branch of the common law variation is necessary I have been greatly encouraged by the memorable words of Denning LJ, in *Nyali Ltd v. Attorney-General* (3). Discussing the proviso to article 15 of the East Africa Order in Council, 1902, as amended by the East Africa Order in Council of 1911, which conferred similar power on the High Court of East Africa to modify the common law, the learned Lord Justice said, at 653:

The ... proviso says, however, that the common law is to apply “subject to such qualifications as local circumstances render necessary”. This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has many refinements, which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common

law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.

Some people may argue that varying the common law in the manner I have indicated would result in placing more burden on the already busy decision-makers. This is an attractive argument, but I think Geoffrey A Flick's counter-argument in his book, cited *supra*, outweighs that argument. At p. 89, the learned author states:

'At least two arguments have been advanced against the giving of reasons. First, the giving of reasons would impose additional administrative burden and might well be an undue drain on the resources of an agency ... Such burdens may even result in the giving of canned reasons. Second, reasons may hinder the manner in which a discretion is exercised and it may be thought that the exercise of some discretion should be unreviewable by the courts. But considerations of administrative expediency should not mitigate principles of fairness and few, if any, discretion should be unreviewable.

In my considered opinion, it is a matter beyond rational controversy that, to borrow the language of the learned author in the book just cited, fundamental requirement of fair play requires that parties should know at the end of the day why a particular decision has been taken. I think it is intolerable in a democratic society that the law should allow a decision-maker to whom an appeal or reference is made to make his decision without giving reasons why he has reached that decision. 'The giving of reasons,' said Lord Denning MR in *Breen's case supra* (at 191), 'is one of the fundamentals of good administration.' Bearing in mind the vast differences which exist between our people and those of England in both social and cultural fields and especially their knowledge of, and attitudes towards, decision-making public bodies, and taking into consideration the comparable educational backwardness of the majority of our people, I think it is in the interests of justice and fair play that the common law relating to the giving of reasons for decisions should be qualified in the manner I have endeavoured to indicate. In my considered opinion, a duty to give reasons and a right to them should be recognized by our law and treated as being of decisive importance in administrative justice. Although a decision of the Minister or Commissioner under s. 26 of the Act is, according s. 27(1), cited *supra*, final and conclusive, that does not mean the decision is not subject to review by courts. That remedy is not excluded by those or similar words: see *Healey v. Ministry of Health* (4);

R v. Medical Appeal Tribunal Ex parte (5); *Taylor v. National Assistance Board* (6), and *Tehrani and Another v. Rostron* (7). No appeal will lie against decisions protected by such words or phrases, but an aggrieved party may come to this Court and ask for prerogative orders. Nullity of a decision is not protected by words 'final' or 'conclusive'. It follows, as day follows night, that the decision which the applicant company has complained against in the instant proceedings falls under this Court's surveillance. It should, perhaps, also be pointed out that neither the failure nor the refusal of a decision-maker to give reasons for his decision is a sufficient exclusion of the Court's surveillance: see *Padfield v. Minister of Agriculture, Fisheries and Food* (8).

I have sufficiently demonstrated, I hope, why I am of the opinion that the Commissioner's failure to give reasons for his impugned decision is a serious irregularity which makes that decision a nullity in law. An order for *certiorari*, like other prerogative orders, is a discretionary remedy. In my considered opinion, every factor in this matter speaks for the discretion being exercised in favour of the applicant company. Mr. *Mwidunda* submitted that *certiorari* cannot be used as an appeal. I agree. But it is a rule of common law that where a determination by a tribunal has been quashed by *certiorari*, the court may, in its discretion, refrain from awarding a *mandamus* to direct the tribunal to redetermine the matter if satisfied that the tribunal will duly observe the law upon a rehearing. Notwithstanding that the court could have effectively enforced an order of *mandamus*: see *Halsbury's Laws of England*, Vol. I, para 125 at 135. Should I invoke that discretion and confine myself to quashing the Commissioner's decision or should I, notwithstanding that there is no such prayer in the application, make an order of *mandamus* directing redetermination of the reference? I confess that this question has exercised my mind quite considerably, but in the end I have reached a clear opinion on it. Quashing the Commissioner's decision and letting the matter lie there will be unsatisfactory to the applicant company as the decision of the Conciliation Board complained against will still be in force. It seems to me, having given the matter careful attention, that an order of *mandamus* should be made, but it must be directed to the Minister himself and not the Commissioner. I am, of course, aware that by Govt Notice No. 283 of 1971 the Minister has, in terms of s. 44 of the Act, delegated the functions imposed and the powers conferred upon him to hear and decide references to the Commissioner. It is my view that that delegation does not make it legally impossible for this Court

to make an order of *mandamus* directing the Minister to determine the applicant company's reference. The law is that delegation does not imply a parting with powers by the person who grants the delegation; see *Huth v. Clarke* (9); *Gordon, Dadds & Co. v. Morris and Others* (10); and *Manton v. Brighton Corporation* (11). In *Huth's* case *supra* Lord Coleridge CJ said at 394 – 395:

But delegation does not imply a denudation of power and authority.... The word “delegation” implies that powers are committed to another person or body which are as a role always subject to resumption by the power delegating, and many examples of this might be given. Unless, therefore, it is controlled by statute, the delegating power can at any time resume its authority:

And at the latter page, Wills J, said, among other things:

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, *Delegates non protest delegate*, as to the meaning of which it is significant that it is dealt with in Broom's Legal Maxims under the law of contracts: it is never used by the legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights.

While I do not cast any aspersions upon the ability of the Commissioner to deal with the reference with an impartial mind, I feel that, for justice not only to be done, but also to be seen to be done, the reference should now be determined by someone else, the Minister himself. I entertain no doubt that I have inherent power to make the order of *mandamus* notwithstanding that there is no prayer for it.

Before parting with this application, I should like to make it perfectly clear that throughout this ruling I have assumed, without deciding, that the conferring of adjudicatory powers upon the Minister does not violate the Constitution of the United Republic of Tanzania.

For the reasons I have given, I grant the application for order of *certiorari* and hereby quash the Commissioner's decision confirming the decision of the Conciliation Board. The Minister for Labour, the first respondent, is hereby directed to personally determine the applicant company's reference in accordance with law as laid down in this ruling. There will be an order for costs against the respondents.

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

Misc. Civil Cause No. 3 of 1996

SAID JUMA MUSLIM SHEKIMWERI

APPLICANT

VERSUS

ATTORNEY GENERAL

RESPONDENT

RULING

SAMATTA, JK:

This is an application by way of a chamber summons for an order of *certiorari* to bring up and quash a decision of the President of the United Republic of Tanzania “retiring” the Applicant, who was an Immigration Officer, in the public interest.

The background to the application may, I think, be stated as shortly as is consistent with intelligibility. On June 1, 1984, the Applicant was employed by the Government of Tanzania as an Immigration Assistant. Following a promotion, on February 1, 1991, he became an Immigration Officer, Grade III. In the third paragraph of his affidavit supporting the application, the Applicant asserts that during the whole of his career in the Civil Service he was never formally warned, reprimanded or in any way penalized for anything done in connection with, or incidental to, the performance of his duties. No information is given in the counter-affidavit contradictory of this averment. In the 2nd June, 1995, issue of the *Daily News*, a government-owned daily newspaper, there appeared an account, among others, to the effect that the then Minister for Home Affairs had sacked 28 officials of the Immigration Department, including the Applicant, for receiving bribes. Upon making inquiries about this story with his superiors the Applicant was informed that the story was essentially false as, among other things, the Minister lacked power in

law to make the reported decision. About two months later – on August 4, 1995, to be more precise – the Applicant received a letter addressed to him by the Acting Principal Secretary (Establishments), whose body reads, in Swahili, as follows:

Ninapenda kukuarifu kwamba, Mtukufu Rais, amekustaafisha kwa Manufaa ya Umma kuanzia tarehe 20 Julai, 1995. Amekustaafisha kwa mujibu wa Kifungu Na. 36(2) cha Katiba ya Jamhuri ya Muungano wa Tanzania ikisomwa pamoja na “Standing Order’ Na/ F35, 44 na 49(C), Kifungu Na. 8(f) cha Sheria ya Malipo ya Pensheni Sura (371); Kanuni za Utumishi Serikalini 1970 Kanuni Na. 29(2) na Sheria ya Utumishi Serikalini Na. 16 ya mwaka 1989 Kifungu Na. 19(3).

2. Aidha, kutokana na uamuzi huu wa kukustaafisha kwa Manufaa ya Umma, utalipwa Pensheni kwa utumishi wako Serikalini hadi tarehe 20 Julai, 1995”.

Speaking through his advocate, Mr. Nassoro, the Applicant says that the President’s decision to retire him in the public interest is invalid in law and ought, therefore, to be quashed by this Court. Mr. Songoro, Senior State Attorney, opposed the application.

Before dealing with counsel’s submissions, it is necessary, I think, to quote *in extenso* the provisions of law relied upon by the President in reaching his impugned decision. As expected, I will start with Article 36(2) of the Constitution of the United Republic (hereinafter referred to as “the Constitution”). The provision reads:

(2) Subject to the provisions of this Constitution and of any relevant written law, the power to appoint persons to offices in the public services of the United Republic, and the power of promotion, termination of appointment, dismissal and disciplinary control of persons appointed to those offices shall be exercised by the President, the Service Commissions and such other authorities as may be specified in respect of any office or category of offices by this Constitution or any relevant written law.

Section 8 of the Pensions Ordinance (the Ordinance), as amended by s. 6 of the Pensions Laws (Miscellaneous Amendments) Act, 1978, provides:

8. Subject to the provisions of section 9A, no pension, gratuity or other allowance shall be granted under this Ordinance to any officer except on his retirement from the public service in one of the following cases:-

(a) on or after attaining the age of fifty:

Provided that in respect of –

- (i) officers in the Police Force of the rank of Constable and officers [in] the Prison Officer, Grade III, this paragraph shall have the effect as if “forty years” were substituted for “fifty years”; and
 - (ii) officers in the Police Force above the rank of Constable and of or below the rank of Sergeant and officers in the Prison Service above the rank of Prison Officer, Grade III and of or below the rank of Prison Officer, Grade I, this paragraph shall have the effect as if “forty-five years” were substituted for “fifty years”.
- (b) in the case of transfer to other public service, in circumstances in which he is permitted by the law or regulations of the service in which he is last employed to retire on pension or gratuity: Provided that, if his service is superannuated under the Federated Superannuation System for universities or similar insurance scheme, he has retired from the public service on one of the grounds mentioned in paragraphs (a), (c), (d), (e) and (f) of this section;
- (c) on the abolition of his office;
- (d) on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he belongs, by which greater efficiency or economy may be effected;
- (e) on medical evidence to the satisfaction of the appropriate authority that he is incapable by reason of any infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent;
- (f) in the case of removal from the public service in the public interest as provided in this Ordinance;
- (g) if he retires from the public service with the consent of

- (h) the President, and the President, by writing under his hand, declares that this paragraph shall apply to him;
- (i) on retirement in circumstances, not mentioned in the preceding paragraphs of this section, rendering him eligible for a pension under the Pensions (Governors of Dominions, etc.) Acts, 1911 to 1947, of the United Kingdom or any Act amending or replacing those Acts:

Provided that a gratuity may be granted to a female officer in accordance with the provisions of this Ordinance, who retires for the reason that she has married or is about to marry, notwithstanding that she is not otherwise eligible under this section for the grant of any pension, gratuity or other allowance”.

Section 19 of the Civil Service Act, 1989, a legislation which repeals and replaces the Civil Service Act, 1962 (Cap. 509), is in the following terms:

19. – (1) The power to dismiss and to terminate the appointment of civil servants shall be exercised in accordance with the provisions of this section.

- (2) the power to dismiss shall not be exercised unless –
 - (a) disciplinary charge is preferred against him;
 - (b) he is afforded an adequate opportunity to answer the charge, and
 - (c) an inquiry is held into the charge in accordance with regulations made under section 24.
- (3) The President may remove a civil servant from the service of the Republic if he considers it in the public interest so to do.
- (4) Nothing in this section shall be construed as restricting –
 - (a) the compulsory retirement of any person under section 10 or in the paragraph (c), (d) or (e) of section 8 of the Pensions Ordinance, or under the provisions of the Tanganyika (Compensation and Retiring Benefits) Order in Council, 1961,

or Retirement (Special Provisions) Act, 1962, or sub-section (2) of section 17 of the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962; or

- (b) The termination, otherwise than by dismissal, of the service of any public officer, other than the substantive holder of a pensionable office, in accordance with the terms of his employment, or the dismissal of any person from any office on the personal or domestic staff of the President or of any person holding an office the emoluments of which are payable at an hourly or daily rate.
- (4) Nothing in sub-section (1) or (2) shall apply to the dismissal of a civil servant who is an employee to whom the provisions of Part III of the Security of Employment Act, 1961, shall apply.
- (5) Nothing in subsection (1), (2) or (3) shall apply in relation to any person holding the office of Controller and Auditor – General”.

I must now proceed to quote Regulation 29 of the Civil Service Regulations, 1970 (the Regulations). The Regulation reads:

29 – (1) Where the Principal Secretary is of the opinion that a reason exists why an officer serving on pensionable terms and who has attained the normal age of voluntary retirement, should be called upon to retire otherwise than on disciplinary or on medical grounds, the Principal Secretary may request the officer concerned to show cause why he should not be compulsorily retired. The Principal Secretary shall forward any representations made by the officer, pursuant to the notice given to him, together with his own recommendations to the appointing authority, who shall decide whether or not such officer should be called upon to retire.

- (2) Where a Principal Secretary is of the opinion that the President should be invited in the exercise of the powers conferred upon him by subsection (3) of section 20 of the Act [the Civil Service Act, 1962], to consider the removal of an officer in the public interest, the Principal Secretary shall furnish to the President through the Principal Secretary (Establishments)

such particulars as the President may, from time to time, by general or specific direction, require”.

Standing Orders F. 35, 44 and 49 for the Public Service, 1971, read as follows:

Standing Order F. 35

“F. 35 All appointments at the pleasure of the President. – Excepting Judges of the High Court and the Controller and Auditor-General whose tenure of office is governed by the terms of the Interim Constitution of Tanzania, all other officers hold their respective offices subject to the pleasure of the President of the United Republic. The pleasure of the President that any one of these officers should no longer hold it, may be signified through the Principal Secretary (Establishments) in which case no special formalities are required”.

Standing Order F. 44

“F. 44 Removal in the public interest. – The President may remove a civil servant or police officer from the public service if he considers it is in the public interest to do so otherwise than for the purpose of localization of the public service. The decision of the President that an officer be removed from the service in the public interest may be signified through the Principal Secretary (Establishments) in which case no special formalities are required. The question of pension will be dealt with in accordance with the relevant provisions of the Pensions Ordinance (Cap. 371)”.

Standing Order F. 49

“F. 49 grounds for retirement on pension and/or gratuity under the Pensions Legislation. The Pensions Act (sic), Cap. 371) and the Regulations made thereunder, set out the circumstances under which a pensionable officer may elect to retire or may be called upon to retire other than on disciplinary grounds. These grounds are summarized below:-

- (a) on or after attaining the age of 45 years: Provided that an officer of the rank of Constable in the Police Force or an officer of the rank of Prison Officer Grade III in the Prisons Service may elect to be called upon to retire after he has attained the age of 40 years;
- (b) on the abolition of his office;
- (c) for purpose of facilitating improvement in the organization of the Department to which he

belongs by which greater efficiency or economy may be effective;

- (d) on medical grounds;
- (e) female officers may elect to retire on marriage, and will be granted such gratuity or pension, if any, for which they may be eligible”.

Those are the provisions of law on which the President, according to the letter addressed to the Applicant by the Principal Secretary (Establishments), quoted above, based his impugned decision. I will now proceed to deal with the contentions addressed to me by counsel. I hope I can summarise those contentions very briefly without doing any injustice to them. In his engaging argument Mr. Nassoro contended that the President's decision is invalid for the following reasons: (1) the basis for the decision is vague because the provisions of law relied upon therein deal with matters of employment which are incompatible; (2) the Standing Orders referred to in the Principal Secretary's letter have no force of law as they were declared by this Court (Mwalusanya J.) in *James F. Gwagilo v. Attorney General*, Civil Case No. 23 of 1983 (unreported) to have been superseded by the Constitution and the Civil Service Act, 1989; and (3) the failure by the President to give reasons for his decision is fatal to the said decision: the President was bound in law to disclose to the Applicant the factor or factors which, in his opinion, constituted the alleged public interest. Mr. Songoro urged me to hold that the President's decision is proper and in accordance with the law of the land. He forcefully contended that the paramount words in the Principal Secretary's letter, as far as the reason for the President's decision is concerned, are the words “amekustaafisha kwa Manufaa ya Umma”. According to the learned Senior State Attorney, the Applicant had no right in law to be given more information than that. Counsel urged me to hold that the President acted within his powers, and the procedure he applied was correct and sufficient. It seems to me that it is desirable, if not necessary, that some of the general principles which I consider to be relevant to the determination of the application now before me should be distinctly set out. In my opinion, the following are those principles:

- (1) The common law principle that a civil servant is dismissible at pleasure (see *Shenton v. Smith* [1895] A.C. 229 and *Gould v. Stuart* [1896] A.C. 575) is not part of the law of this country: see Article 36(2) of the Constitution as read together with Article 26(1) of the said Constitution, and *James*

F. Gwagilo's case supra. In this country, civil servants are dismissed for misconduct only: see section 19(2) of the Civil Service Act, 1989. When a civil servant is dismissed cause must be assigned. The English common law doctrine of “service at pleasure” has, as, I hope, amply demonstrated above, no place in the law of this country. The saying “Whatever pleases the emperor has the force of law” forms no part of our law.

(2) While in England the courts are not concerned with the Civil service as such, because the civil servant there is in law only a servant of the Crown, dismissible at the pleasure of the Queen without notice or compensation, in Tanzania the civil servant has some legal rights, including the right to be afforded an opportunity to show cause why he should not be dismissed from the service, which are enforceable in the courts.

(3) No power conferred by law on a public leader or officer is absolute or limitless. Every such power must be exercised in good faith and in accordance with the Constitution and other laws. Any assertion that Presidential powers brook no limitation would have no basis in law.

(4) Compulsory retirement of a civil servant or his removal from service in the public interest may be challenged in this Court on, among others, any of the following grounds:

- (a) the legislation under which the impugned decision was made is unconstitutional;
- (b) the decision is *mala fide*, i.e., it is actuated by malice or some purpose other than that for which it is authorized by the law: malice would be held to exist where, for example, the alleged public interest, where **removal** is concerned, is founded upon non-existing facts;

(5) The Standing Orders for the Public Service have no legislative effect; they are meant for departmental and administrative purposes: see *I.G. Lazaro v. Josephine Mgombera* Civil Appeal No. 2 of 1986 (C.A.) (unreported). Those Orders form the internal law of the Civil Service.

Having stated these principles, I proceed to ask myself whether the impugned decision of the President is not valid in law. My mind is free from doubt as to how that question ought to be answered. I agree with Mr. Nassoro that the President's decision is unsupportable in law. I hold that view for the following reasons:

- (1) The letter from the Principal Secretary cites provisions of law which are incompatible, that is to say, provisions which do not go together.

Whereas the removal of a civil servant from service under s. 8(f) of the Ordinance, S. 19(3) of the Civil Service Act, 1989, Regulation 29(2) of the Regulations and Standing Order F. 44 is based on the general requirement of **public interest**, the removal under Standing Order F. 49(c) must specifically be based on the need of, to quote the Order, “facilitating improvement in the organization of the Department to which [the civil servant] belongs by which greater efficiency or economy may be effective”. By being based on the two sets of provisions the President’s decision has, I agree with Mr. Nassoro, caused the Applicant considerable embarrassment.

(2) The citation was the Principal Secretary’s letter, of Standing Orders No. 35 as being one of the legs on which the President’s decision was intended to stand suggests, very strongly, that in making, or coming to, his decision the President was under the mistaken belief that the Applicant held his office in the Immigration Department at his (the President’s) pleasure. I have, I hope, sufficiently demonstrated that in this country civil servants, including immigration officers, do **not** hold office at the pleasure of the President. It is perfectly correct to say that a civil servant’s security of tenure is lesser than that of a judge, but it is equally correct to observe that that security is not as limited as is implied by the Principal Secretary’s letter. Standing Order F. 35 cannot be valid in law, because it is inconsistent with the provisions of sections 22 and 36(2) of the Constitution as read together with Article 11(1) of the said Constitution.

(3) No provision of law speaks of retirement of a civil servant in the public interest. Neither section 19 of the Civil Service Act, 1989 nor Regulation 29 of the Civil Service Regulations, 1970, confers on the President power to retire a civil servant in the public interest. The provisions speak of removal, and not retirement, in the public interest. It is not of little interest to point out that even Standing Order F. 44 does not speak of retirement. It speaks of removal. Paragraph (d) of section 8 of the Ordinance refers to compulsory retirement for the purpose of facilitating improvement in the organization of the department to which the servant belongs, by which greater efficiency may be effected. Neither what is stated in the Respondent’s counter-affidavit nor what fell from the lips of Mr. Songoro at the Bar during the hearing of the application gives even a faint suggestion that the purported termination of the Applicant’s employment falls under one of the categories of compulsory retirement mentioned in section 10 of the Ordinance, as amended by s. 7 of the Pensions Law (Miscellaneous amendments) Act, 1978. When all this is taken into account, it must be correct to say, as I do, that the use of the

word “amekustaafisha” in the Principal Secretary’s letter to the Applicant causes even more confusion as to exactly why the President acted in the manner he did with regard to the Applicant’s employment.

Since I am of the settled opinion that the above three grounds constitute a sufficient warrant for faulting the President’s decision, I do not find it necessary to consider Mr. Nassoro’s argument that, when ordering the removal of a civil servant from public service in the public interest, the President is bound in law to give reasons disclosing factors which, in his opinion, constituted public interest in the particular case, In *James F. Gwagilo’s* case *supra*, Mwalusanya J. was of the clear opinion that such reasons must be given. Though the point is not an uninteresting one, I do not, for the reason I have given, think it right to lengthen this ruling by discussing it.

Before I part with this application, I would like to say a word or two on the true application of the provisions of section 23 of the Civil Service Act, 1989. The section reads:

23 – (1) No proceedings shall be brought in any court on ground only that the provisions of this Act, other than the provisions of sub-section (2) of section 3 and Part V, have not been complied with; but nothing in this section shall apply to any criminal proceedings for an offence against any of the provisions of this Act.

(2) The question whether –

- (a) The President validly performed any function conferred on him by section 36 of the Constitution or by this Act;
- (b) the Commission or other delegate has validly performed any functions the exercise of which has been delegated or deputed to it or him, shall not be enquired into by or in any court, subject to the provisions of sub-section (3).

(3) Where a person is dismissed, the provisions of sub-section (2) shall not apply in relation to that dismissal unless prior to the dismissal, the provisions of section 19(2) are complied with.

I was inclined to think that I was not deterred by these provisions from entertaining the instant application. In my opinion, those provisions do not take away the supervisory jurisdiction of this Court where it is alleged, as is the case in the present application, that a decision made by

the President under section 36 of the Constitution and the provisions of the Civil Service Act, 1989, is invalid in law. As I understand the law, if a decision purportedly made by an authority which falls under the supervisory jurisdiction of this Court is challenged on the ground that it is not valid in law or it is null and void it becomes the bounden duty of the Court to hear the aggrieved party. It must be distinctly understood, however, that this Court's supervisory jurisdiction is one of supervision and not of appeal or revision. When it exercises that jurisdiction this Court does not sit as a super-executive. Thus, when it issues an order of *certiorari* the Court does **not** substitute another order in the place of the quashed order, but it removes that order out of the way, as one which should not be used to the detriment of any individual: see *Walsall Overseers v. Railway Company* (1878) 4 App. Case 30, 39. Where an authority exceeds its jurisdiction, its decision will be regarded by the courts as invalid in law and beyond the protection of any exclusionary formula: see *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147. Parties to disputes as to legal rights must have access to legal tribunals for the settlement of those disputes.

For the reasons I have given. I hope not at an inordinate length, I allow the application and quash the President's decision purporting to retire the Applicant in the public interest. The Respondent is to pay the Applicant's costs in the application.

(Sgd :)

B.A. Samatta

JAJI KIONGOZI

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

*Consolidated Civil Applications Nos. 19
of 1999 and 27 of 1999*

BETWEEN

TANZANIA ELECTRIC SUPPLY COMPANY LTD
(APPLICANT)

And

INDEPENDENT POWER TANZANIA LTD
(RESPONDENT)

1. THE PERMANENT SECRETARY MINISTRY
OF ENERGY AND MINERALS
(APPELLANTS)

2. PERMANENT SECRETARY MINISTRY OF FINANCE

3. THE HON. ATTORNEY GENERAL

And

INDEPENDENT POWER TANZANIA LTD.
(RESPONDENT)

(APPLICATION FOR STAY OF EXECUTION FROM THE RULING
AND ORDER OF THE HIGH COURT OF TANZANIA AT DAR ES
SALAAM)

(MSUMI, J.K.)

DATED THE 9TH DAY OF ARCH 1999 IN

Misc. Civil Application No. 61 of 1999

RULING

SAMATTA, J.A.:

I have before me two applications which have been consolidated, brought under Rule 9(2)(b) of the Tanzania Court of Appeal Rules, 1979 (hereinafter referred to as “the Rules”), for stay of the enforcement of the order made by the High Court (Msumi, J.K.) in Misc. Civil Application No. 61 of 1998, pending the determination of appeals from the said order the applicants intend to lodge before this Court notices (under Rule 76 (1) of the Rules) of which have already been lodged. Counsel for all the parties have made their submissions in writing.

The salient facts which constitute the background to the applications can, I think, be stated as shortly as is consistent with intelligibility. The respondent company, Independent Power Tanzania Ltd., a limited liability company registered under the Companies Ordinance, is a joint venture company between Mechmar Corporation Bhd. of Malaysia (MECHMAR and VIP Engineering and Marketing Limited (VIPEM) established for the purpose of building, owning and operating a 100 MW Power Plant at Tegeta in Dar es Salaam. On My 26, 1995, the company entered into a Power Purchase Agreement (the PPA) with one of the applicants, Tanzania Electric Supply Company, hereinafter referred to by its acronym, TANESCO, whereby the former agreed to sell and make available to the latter company, which agreed to purchase from and after the commercial operation date, electric power generated at the Tegeta plant. Initially, it was agreed between the parties that the monthly reference tariff of purchase price would be USD 4.2 million. On June 8, 1995, the parties signed an Implementation Agreement (the IA) wherein the Government of Tanzania guaranteed, *inter alia*, performance of the payments obligations of TANESCO to the respondent company. A day later, the parties signed Addendum No. 1 of the PPA in which they agreed that before the commencement of operations at the plant the Reference Tariff would be “adjusted upwards or downwards depending on the effect of changes that will have taken place any or all of the underlying assumptions stated in the [PPA]”. Utilizing the loans amounting to USD 105 million secured from two Malaysian banks and USD 45.0 million provided by MECHMAR and VIPEM, the respondent company caused the design and constitution of the power plant at Tegeta. Following that step, it submitted to TANESCO documents which, it asserted demonstrated that the total capital cost of the Project without Gas Convention Equipment amounted to USD 150.0 million.

The company informed TANESCO that, on the basis of that capital cost, the monthly capacity payments would be USD 3,623 million, TANESCO was not prepared to accept that figure. On or about April 9, 1998, it issued a Notice of Default under the PPA alleging that the respondent company had defaulted on its obligations to supply and install slow speed diesel generator sets. The respondent company rejected the Notice. Discussions between the parties could not resolve the dispute. The applicants refused to honour the suggested Initial Operation Date (IOD) of August 31, 1998. On November 25 TANESCO filed a request for arbitration against the respondent company before the International Centre for the Settlement of Investment Disputes (the ICSID) under the relevant provisions of the PPA. Faced with threats from its leaders and creditors to hold it in default, five days later the respondent company filed before the High Court Misc. Civil Application No. 61 of 1998 in which it sought the following reliefs:

- (1) a declaration and order that the Initial Operations Date for the Tegeta power plant be deemed to have occurred on August 31, 1998, and 15th September, 1998, respectively;
- (2) an order requiring TANESCO “to pay in accordance with the provisions of the Power Purchase Agreement interim monthly capacity payments of USD 3,623 million to the Applicants With effect from 15th September, 1998, until when the tariff dispute between the Applicant and the Respondents shall be finally and conclusively resolved;
- (3) an order directing TANESCO to pay Energy Charges based on the provisions of the PPA;
- (4) an order directing TANESCO, the Permanent Secretary of the Ministry of Energy and Minerals, and the Permanent Secretary of the Ministry of Finance to discharge their respective obligations stipulated in the PPA and the IA in consequences of the orders granted under paragraphs 1, 2 and 3 of the Chamber Summons;
- (5) a “Declaratory Order” issued against TANESCO and the Permanent Secretary of the Ministry of Energy and Minerals “restraining them from employing delaying tactics through frivolous and unequitable

interpretations of the terms of the Power Purchase Agreement, the Implementation Agreement and the Generation Licence”;

- (6) an order that “the Interim Mandatory Orders shall subsist until when the tariff dispute is resolved and that upon resolution of the dispute recalculations shall be made from 15th September, 1998, till the date when the dispute is resolved using the awarded tariff rates and in case the result will be that the Applicants were overpaid during the interim period such over payments shall be recovered from future monthly capacity payments due to the Applicants and vice versa”;
- (7) the basis of the application be borne by the respondents; and
- (8) any other additional interim reliefs that the Court may deem just and equitable to grant.

This application was brought under Order XI, 11, 12 and sections 68(e) and 95 of the Civil Procedure Code (hereinafter referred to as “the Code”) and s. 2(2) of the Judicature and Application of Laws Ordinance (the Ordinance). Following a short ruling on an application for adjournment, which was dismissed, the applicants (the then respondents) filed petitions praying for stay of the proceedings under s. 6 of the Arbitration Ordinance, Cap. 15. That section reads:

6. Where any party to a submission to which this Part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or of any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other step in the proceedings, apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The respondent company opposed the petitions, arguing that they were bad in law because the applicants could not have the court’s powers

under the provisions of s. 6 of the Arbitration Ordinance exercised in their favour when, by applying for adjournment so that they could file applications for stay of execution, they had taken steps in the proceedings. The learned Jaji Kiongozi found this argument valid in law. On March 3, 1999, after the parties' counsel had filed their written submissions, he gave his ruling on the merits of the application. He granted all reliefs sought except the fifth relief, *to wit*, an order restraining TANESCO and the Permanent Secretary of the Ministry of Energy and Minerals from "employing tactics through frivolous and unequitable interpretations of the terms of the Power Purchase Agreement, the Implementation Agreement and the Generation Licence". It is this decision which the applicants intend to appeal against before this Court. It is common ground that the respondent company filed no suit in the High Court in respect of the dispute between it and the applicants.

On behalf of TANESCO, Mr. Mkono, learned advocate, who has been assisted by Dr. Kapinga and Dr. Mwaikusa, has submitted, among other things, the following: first neither under Order XXXVII, r.1 (b) of the Code, which permits a party to a suit to seek from the court conservatory measures, nor under any provision of other laws is a litigant before a court in this country entitled in law to be granted a "final judgment" before the dispute before the court is determined. According to the learned advocate, the proceedings instituted before the High Court in this case were not preservative proceedings. By instituting those proceedings the respondent company purported to avoid instituting substantive proceedings. Secondly, having consented to the arbitration before the ICSID, the respondent company, in terms of Article 26 of the Convention establishing the Centre, forfeited its right to seek a relief or reliefs in another forum. Thirdly, relying on *Linotype – Illell Ltd. V. Baker* [1993] 1 WLR. 321, *Winchester Cigarette Machinery Ltd. v. Payne* (NO. 2), *The Times*, December 15, 1993, *Condex v. Bank of Zambia* [1997] 1 All ER. 722 and *Tanzania Cotton Marketing Board v. Coget Cotton Company S.A.*, Civil Application No. 52 of 1996 (C.A.) (unreported), the balance of convenience in this case swings in TANESCO's favour because, as asserted in the supporting affidavit of Mr. Jolin Killar Madaha, the Deputy Managing Director (Corporate Services) of TANESCO, if the order made by the learned Jaji Kiongozi is enforced, as prayed, by the end of May, TANESCO will be running a deficit of T.Tshs. 6.09 billion, with the result that an extraordinary economic harm would befall upon the country because the power company would be rendered financially

incapable of generating electricity and therefore of buying electricity even that produced by the respondent company. Granting a stay of execution in *Lino-type Hell Ltd's* case *supra*, Staughton, L.J., said, *inter alia*:

It seems to me that if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.

Mr. Mkono has strenuously urged me to hold that the balance of advantage lies in “not visiting upon the population of Tanzania grave and severe hardship which would inevitably follow if the order of Msumi, J.K. is now enforced”.

Mr. Mwidunda, counsel for the applicants in Civil Application No. 27 of 1999, has essentially made submissions similar to those made by Mr. Mkono. Submitting on the kind of harm that would allegedly be inflicted on the country if the applications for stay of execution are not granted, the learned State Attorney drew my attention to what Mr. Madaha deposes in his affidavit on the point, and then said: “if the payment of the amounts by TANESCO to the respondent as ordered by the High Court Order is not stayed, the effects on TANESCO and as well as the overall electricity industry in Tanzania will be irreparably disastrous. All the industrial and economic sectors of production will stop and public and social services including hospitals will be paralysed ... The exact magnitude of loss to be suffered is incalculable as it will affect each and every person in Tanzania including the Respondent as there will be no production and transmission of electricity”. The learned State Attorney has drawn my attention to the following passage in Ralph Gibson, L.J.'s judgment in *Winchester Cigarette Machinery's* case *supra*:

In recent cases it has been said that the practice of the Court has moved on from the principle that the only ground for a stay was the reasonable probability that damages and costs would not be repaid if the appeal succeeded. Those cases held that the approach of the Court now was a matter of common sense and balance of advantage.

Dr. Tenga, learned advocate, who has been assisted by Miss Hawa Bayona, has, on behalf of the respondent company, strenuously opposed the applications, which he has described as “a mere device to abuse the due process of the law”. Relying on the judgment of Kaji, J. in *Nicholas Mere Lekule v (1) Independent Power (T) Ltd. (2) The Attorney General*, Misc. Civil Cause No. 117 of 1996 (unreported) and the decision of this Court (Lubuwa, J.A.) in Civil Application No. 70 of 1996 between

the same parties (unreported), the learned advocate has contended that in this country a court can, without a pending suit, entertain an application for a mandatory injunction or a similar relief. According to the learned advocate, the order which the learned Jaji Kiongozi made in the respondent's favour is an intention or conservatory relief and not, as has been described by the applicants' counsel, a final interlocutory judgment. Dr. Tenga also submitted, on this aspect of the case, that the common law confers on a court of law jurisdiction to grant an interim mandatory injunction. The learned advocate cited *Copee Lavalu S ANV v. Keu Ren Chemicals and Fertilisers Ltd.* (in liq.) [1994] 2 All ER 449 in support of that submission. According to Dr. Tenga, the intended appeals have no prospects of success.

On the issue of balance of convenience, Dr. Tenga has submitted that it is impossible to reconcile the assertion that if the learned Jaji Kiongozi's order is not stayed, TANESCO would suffer irreparable loss which cannot be atoned by way of monetary compensation, with the fact that the PPA and the IA between the parties are valid and binding upon them. The learned advocate has further submitted that the continual wasting of the available electricity of the respondent company when, it is in any case bound to be paid for whether or not it is used, either by way of an enhanced monthly capacity tariff or higher total capacity payments, is what could lead to irreparable loss. According to the learned advocate, if no interim monthly capacity payments are made, the respondent company will fail to meet its bank interest and debt repayments, which may cause the lenders taking over the power plant at Tegeta, a step which will render arbitration nugatory. Concluding his submission on this point Dr. Tenga drew my attention to the following observation in the judgment of Backley, J., in *Charrington v. Simons & Co. Ltd.* [1970] 1 WLR 725, at p. [1970]:

A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant.

Dr. Tenga has urged me to hold that common sense calls for the dismissal of the applications now before me because, as he put it, the learned Jaji Kiongozi merely ordered the parties to perform according to the agreements they had entered into until the final arbitration award. Drawing my attention to the "fact" that the capital costs have arisen from USD 150.0 million to USD 171.0 million as at June 30, 1999, and they will continue to build up until adequate interim capacity payments are made, the learned advocate urged me to find that "it will actually

be saving the Applicants and indeed the whole country from further unnecessary costs by refusing to grant the Stay of Execution than by granting it because if there is delay in starting to make the interim payments there will be an inevitable increase in the Tariff, the increase that will mean paying for power that was not used”.

Submitting specifically on the application of the two Permanent Secretaries and the Attorney General, Dr. Tenga has contended that that application should be summarily dismissed because, as he has put it, having indicated to the High Court that they did not object to guaranteeing the interim payments that are due to the respondent from TANESCO, those applicants have no cause for appeal.

Before I proceed to deal with the merits or otherwise of the rival arguments I have summarized above, I wish to make two observations. First, there were other arguments addressed to me in the two applications, but, for reasons which, I hope, will be apparent in this ruling, I do not find it necessary to deal with them. Secondly, no less than 50 authorities have been cited in argument in the applications. Although I have examined all of them, in this ruling I will make specific reference to only some of them. With those two observations made, I proceed now to consider the merits or otherwise of the applications.

It cannot be doubted that the power to order a stay of execution which is conferred upon this Court by Rule 9(2)(b) of the Rules is a discretionary power. A judicial discretion must be exercised according to common sense and according to justice. As was observed over two hundred years ago by Lord Mansfield in *Rex v. Wilkes* (1770) 4 Burr. 2257 (cited by Sir Jocelyn, P., in *Povey v. Povey* [1971] 2 WLR 381 at p. 387):

discretion, which applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary and fanciful; but legal and regular.

In this country, it is now well established, I think, that the following are the principal factors a court should consider whether or not to grant a stay of execution:

- (1) Whether the appeal has, *prima facie*, a likelihood of success.
- (2) Whether its refusal is likely to cause substantial and irreparable injury to the applicant.
- (3) Balance of convenience.

The first question I ask myself and which I shall endeavour to answer is whether the provisions of law upon which the respondent company purported to base its application before the High Court, read together or individually, *prima facie* conferred jurisdiction on the Court to entertain that application. As will be recalled, those provisions were Order XI, 11, r.2 and sections 68(c) and 95 of the Code, and s. 2(2) of the Ordinance. I will start with Order XLII, r.2.

Order XI, 11, r.2

This rule must be read together with rule 1 of the same Order. The two rules read as follows:

1. – (1) Any person considering himself aggrieved –
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
 - (b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate court the case on which he applies for the review.
2. An application for review of a decree or order of a court, other than the discovery of such new and important matter or evidence as is referred in rule 1 on the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the magistrate who passed the decree or made the order sought to be reviewed, but any

such application may, if the magistrate who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor”.

Plainly, these two rules were utterly irrelevant to the application. Relating to applications for review of judgments, as they do, those rules have nothing to do with applications for “interim reliefs”. Having said that, I turn now to a consideration of the next provision – section 68(c)

Section 68(c)

For reasons which should be clear shortly, I propose to quote not only the whole of that section, but also the section immediately following it, namely, section 69. Those sections read:

68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf –

- (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him as a civil prisoner;
 - (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
 - (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold;
 - (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
 - (e) make such other interlocutory orders as may appear to the court to be just and convenient.
- (f) 69. – (1) Where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section –
- (g) it appears to the court that such arrest, attachment or injunction was applied for on insufficient grounds, or
 - (h) the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same,

- (i) the defendant may apply to the court, and the court may, upon such application, award against the plaintiff by its order such amount, not exceeding two thousand shillings, as it deems a reasonable compensation to the defendant for the expense of injury caused to him.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction". (The emphasis is supplied).

These two sections fall under PART VI of the Code, which is headed SUPPLEMENTAL PROCEEDINGS. The word "supplemental" is defined in Black's Law Dictionary, abridged 6th ed., at p. 1003, as "that which is added to a thing or act to complete it". In my opinion, the heading suggests that the powers conferred upon the court by the two sections can be invoked only where there is a suit before it. Section 68 does no more than summarise the general powers of courts in regard to interlocutory proceedings, the details of which are set out in the First Schedule to the Code. I am unable to read anything in that section as conferring upon the court the power to enter a monetary judgment in favour of an applicant. Applications made under the section are intended to assist the applicant in the prosecution of his case, whether before or after final judgment, or to enable the court to protect the subject-matter of the primary proceeding before the rights of the parties are finally determined. It should be distinctly understood that the right conferred by section 69 upon a person who has not instituted a suit to apply for what in effect is a monetary judgment is an exception to the general rule that a claim for monetary judgment must be made by way of a suit. I have sufficiently demonstrated, I hope, that, *prima facie*, the respondent company's application in the High Court could not in law be made under s. 68(c) of the Code. I proceed, therefore, to a consideration of the application of section 95.

Section 95

The section provides:

95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

As I understand it, this section does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do, and does, is to save inherent powers of those courts. The section is

undoubtedly a very useful provision, but it is not a panacea for all ills in the administration of justice in civil cases. Commenting on section 151 of the Indian Code of Civil Procedure, which is in *pari materia* with that section, the learned authors of **The Law of Civil Procedure**, 6th ed., observe, at p. 324, as follows:

The power is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment.

Prima facie, section 95 constituted no authority for the High Court to entertain the respondent company's application. That opinion brings me face to face with the question whether, *prima facie*, s. 2(2) of the Ordinance confers jurisdiction on courts to entertain the kind of application which the respondent company filed before the High Court.

Section 2(2) of the Ordinance

The sub-section reads as follows:

(2) Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanganyika on the date on which this Ordinance comes into operation (including laws applied by this Ordinance) or which may hereafter be applied or enacted, and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Ordinance comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Ordinance or Ordinances passed in and for Tanganyika, or may hereafter be modified, amended or replaced by other provision any such Ordinance or Ordinances or any Act or Acts of the Parliament of Tanganyika.

Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in Tanganyika only so far as the circumstances of Tanganyika and its inhabitants permit,

and subject to such qualifications as local circumstances may render necessary.

The Code (the Civil Procedure Code) cannot be said to be exhaustive. It would be unrealistic to expect the legislature to contemplate all possible circumstances which may arise in litigation. It is legitimate, therefore, to apply, under the above quoted sub-section of the Ordinance, relevant rules of common law and general statutes of application in force in England/Tanganyika on the twenty-second of July, 1920, where the Code is silent. Applying that power, in *Nicholas Mere Lekule's* case *supra*, Kaji, J., held that the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending institution of a suit. About two years later, in *Tanganyika Game Fishing and Photographic Ltd. v. (1) The Director of Wildlife (2) The Attorney General (3) Muthundu and Company (T) Ltd.*, Misc. Civil Cause No. 42 of 1998 (unreported), Katiti, J., invoked the power under the sub-section and held that the court has the inherent power to grant a temporary injunction order in circumstances not covered by Order XXXVII of the Code. The provisions of that Order confer jurisdiction on the court before which a suit has been instituted to grant a temporary injunction, to order interim sale and to make an order for the detention, preservation or inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein. I have no doubt that both cases were rightly decided, but I do not think that those decisions are helpful to the respondent company in the present proceedings. I hold that view because neither Kaji, J., nor Katiti, J., held that a relief in the form of monetary judgment can be granted where there is no suit or before a suit is determined.

As will be recalled, on the issue of jurisdiction Dr. Tenga also relied on *Copee-Lavalin's* case *supra*. With respect, I am unable to see how that case supports the proposition that in England a court can enter what in effect is a monetary judgment where there is no suit before the court. In that case the House of Lords held that a court has jurisdiction to grant an interim relief in form of security for costs to a party to an international arbitration. According to their Lordships, that jurisdiction is inherent or created by s. 12(6) of the Arbitration Act, 1950, as amended, which reads:

The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of – (a) security for costs ... (c) the giving of evidence by affidavit (d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness

out of the jurisdiction: (c) the preservation, interim custody or sale of any goods which are the subject matter of the reference; (1) securing the amount in dispute in the reference; (g) the detention, preservation on inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any persons for enter upon of into any land or building in the possession of any party to the reference or authorizing any samples to be taken on any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information on evidence; and (h) interim injunctions on the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court: Provided that nothing in this subsection shall be taken to prejudice any power which may be versed in an arbitration on umpire of making orders with respect to any of the matters aforesaid.

In this country, there is no statutory provision which is similar to this provision which cannot be applied here (in Tanganyika) as it was enacted after July 22, 1920, assuming that it is a statute of general application). Be that as it may, the jurisdiction referred to be *Coppe-Lavalin's* case *supra* is not that of granting interim reliefs in the form of monetary judgments. Similarly, I can find nothing in the decisions or observations made in *Metropolitan Tunned and Public Works Limited v. London Electric Railway Company* (1926) Ch. 371; *Resort Condominiums International Inc., v. Bolwell and Another* 118 ALR 655; and *Tanganyika Game Fishing's* case *supra* which can be said to support Dr. Tenga's submission. The last case, as will be recalled, dealt with the issue, among others, whether a temporary injunction can be granted in circumstances not governed by Order XXXVII of the Code. There was an issue in the case whether a monetary judgment can be entered in favour of a party who has not filed a suit. In a useful passage, if I may so describe it, the learned authors of Halsbury's Laws of England, Bul. Ed., Vol. 22, para 1613., at p. 752 list situations in which the English law authorises the giving of judgments and making of orders. The passage reads:

Apart from orders determining questions as to procedure, a judgment or order may be given or made at the trial of hearing of an action, or on the hearing of an appeal of, in the case of actions commenced by writ, as a result of (1) the consent of the parties, of (2) admissions by either party, of (3) default of appearance by a defendant, of (4) default of delivery of a defence, of (5) certain procedural defaults, of (6) in certain cases, an application by the plaintiff for summary judgment when he can satisfy

the court that he is clearly entitled to the relief claimed, of (7) acceptance of a payment into court, of (8) after trial of an issue. (the emphasis is supplied).

It leaps to the eye that under the common law a court has no power to give a judgment in favour of an applicant who has not instituted a suit. I agree with Mr. Mkono that *prima facie* the reliefs which the High Court purported to grant the respondent company were not “preservatory measures” as the Court’s order required TANESCO to make payments to the respondent company. A decision of a court of law cannot be a preservatory order by merely lying that label to it.

Before I part with the issue of jurisdiction, I must deal, as briefly as possible, with Dr. Tenga’s last two arguments on the matter. The first of those arguments was that, the parties having agreed before the learned Jaji Kiongozi that preliminary points which were capable of disposing of the whole of the respondent company’s application be considered first, the jurisdiction of the court to entertain the application became, as a result, a non-issue. In his response to this argument Mr. Mkono disputed the existence of that agreement. I am prepared to assume that the parties did reach that agreement. Having made that assumption, I must say at once that the agreement is, *prima facie*, incapable of advancing the respondent company’s case. It is a principle of law that parties cannot by agreement or otherwise confer jurisdiction upon a court: see *Farquharson v. Morgah* [1894] 1 Q.B. 552; *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 2 WLR 802 at p. 820; *Allatakha v Aga Khan* [1969] E.A. 613 at p. 617 and *Royal Bank of Scotland Ltd. v. Citrusdal Investments Ltd.* [1971] 1 WLR 1469 at p. 1472. The parties’ agreement in the case now before me could not, therefore, create new jurisdiction in the High Court. The second argument was that the application of the Permanent Secretaries and the Attorney General should be summarily dismissed because, as Dr. Tenga put it, having indicated that they did not object to guaranteeing the monthly interim payments that are due to the respondent company from TANESCO, those applicants have no cause for appeal. There is, I think, a simple answer to this contention. By making that statement the three applicants were not admitting that the amounts of payments demanded by the respondent company were the amounts TANESCO owed. The *quanta* of those payments were very much in dispute between the parties. This was evident in the spirited opposition those applicants, like TANESCO, attempted to put up against the respondent company’s claims. I fear I cannot put any weight on Dr. Tenga’s argument.

In spite of the wealth of ingenuity spent by Dr. Tenga on the issue of jurisdiction, it is my settled opinion that, *prima facie*, the High Court had no jurisdiction to entertain the respondent company's application for a relief in the form of money judgment.

I shall now deal, very briefly, with the remaining two factors I am required to consider in the two applications. There can be no doubt, upon the evidence laid before me, that whichever side loses in the applications now before me the opposite side is likely to sustain a substantial and irreparable loss. It is conceivable that lesser payments may not have on TANESCO the divesting effect described by Mr. Madaha in his affidavit. Any substantial adjustments made in that company's favour after arbitration would surely not prevent that damage. With regard to the question of balance of convenience, I wish to observe that the scales of justice appear to me to be slightly tilted in the applicants' favour, bearing in mind what is deposed in the opposing affidavits.

For the reasons I have given, I am satisfied that, as ably contended by Mr. Mkono and Mr. Mwidunda, the applicants' intended appeals have prospects of success and that both justice and common sense call for the granting of the two applications for stay of execution. I grant those applications as prayed with costs.

DATED at DARES SALAAM this 8th day of July, 1999.

Sgd:

JUSTICE OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

Coram: Samatta, C.J., Kisanga, J.A. and Lugakingira, J.A.

Civil Appeal No. 64 of 2001

JULIUS ISHENGOMA FRANCIS NDYANABO

(APPELLANT)

VERSUS

THE ATTORNEY GENERAL

(RESPONDENT)

(APPEAL FROM THE MAJORITY DECISION OF THE HIGH

COURT OF TANZANIA

AT DAR ES SALAAM)

(HON. KYANDO, IHEMA JJ AND KIMARO J)

DATED 29TH JUNE, 2001

IN

Miscellaneous Civil Cause No.2 of 2001

JUDGEMENT OF THE COURT

SAMATTA, CJ:

This is an appeal from a decision of the high Court (Kyando and Ihema, JJ, Kimaro, J., dissenting) dismissing a petition filed by the appellant for a declaration that Section 111(2), (3) and (4) of the Elections Act, 1985 (the Act) is unconstitutional for being violative of Article 13(1), (2) and 6(a) of the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution). Essentially, the appeal is about access to justice.

The background to the appeal may, we think, be stated as follows. In the general election held in this country in October 2000 the appellant,

an advocate by profession, entered into a contest for the Parliamentary seat in Nkenge Constituency. According to the results of the contest announced by the Returning Officer, the appellant lost the election. He was aggrieved by those results. As he was entitled under section 111 (1) of the Act, he filed an election petition before the High Court, questioning the validity of the declared victory of one of his opponents in the election. The Registrar of the Court has not, in compliance with the provisions of Section 112) of the Act, fixed a date for the hearing of the petition. The subsection, as amended by the Electoral Laws (Miscellaneous Amendments) Act, 2001, reads:

(2) The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court, as security for costs, a sum of five million shillings in respect of the proposed election petition.

The appellant, who has not paid the required deposit, decided to file, under Article 30(3) of the Constitution and section 4 of the Basic Rights and Duties Enforcement Act, 1994, a petition questioning the Constitutionality of the subsection and praying for a declaration that the said statutory provision is unconstitutional. It is the decision of the High Court on that petition which has given rise to the appeal now before us. Before the High court it was the appellant's contention that the requirement in the subsection is unconstitutional, on the ground that it is arbitrary, discriminatory and unreasonable and therefore it constitutes an unjustified restriction on the right of a citizen to be heard by the Court on his complaint against illegalities or irregularities in the conduct of a Parliamentary election. The learned Attorney General's response to the petition was a fairly simple one: the requirement to deposit Tshs. 5 million as security for costs was "consistent with the avoidance of unnecessary and unreasonable costs to the Government, as well as individuals involved which can be caused by unreasonable and vexatious petitioners who might bring petitions without any reasonable cause." The learned Attorney General urged the learned Judges of the High Court to hold that the appellant had taken a wrong step in law in challenging the constitutionality of the requirement of depositing Tshs. 5 million as security for costs; what he should have done was to file an application under Rule 11(3) of the Elections (Elections Petitions) Rules, 1971 as amended (for short 'the rule') for a direction that he gives such other form of security as the court would consider fit or that he be exempted from payment of any form of security for costs. The learned Attorney General also rested his defence to the petition on the provisions of Article 30(2)(a) and (f) of the Constitution, asserting that those claw

back clauses save the statutory requirement of depositing Tshs. 5 million as security for costs complained against by the appellant from the vice of unconstitutionality. It was his case that the provisions of Section 111 meet the test of Constitutionality laid down by this Court in *Kukutia Ole Pumbun and Another v Attorney General and another* [1993] T.L.R 159. Kyando and Ihema, JJ., who examined the issue raised before the Court at a great length, entertained no doubt whatsoever that the statutory provision under attack does not suffer from unconstitutionality. In the course of their ruling they said:

We have carefully considered the parties' pleadings and their lucid submissions thereto and we are of the firm view that the petition has been filed without any colour of merit. It is bound to fail.

Accepting as they did, the contention of counsel for the learned Attorney General that the impugned statutory provision was aimed at protecting respondents in election petitions on the question of costs, the learned judges said:

As a general principle payment of security for costs is intended to secure "the payment of costs if such person does not prevail." And as correctly submitted by Mr. Mwidunda, learned Senior State Attorney, for the respondent the provision for costs puts a just and fair obligation on the part of the petitioner to secure the costs of those he drags to court and as such the provision is legally necessary to protect a respondent in the costs to be incurred in the litigation. We agree and hold that the provisions of Section 111(2) of the Elections Act, 1985, as amended, are in tandem with article 30(1) and 2(a) and (f) of the Constitution of the United Republic of Tanzania, imposing limitations upon, and enforcement and preservation of basic rights, freedoms and duties.

Article 30(1) and (2)(a) and (f) of the Constitution provides:

30.-(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.

(2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of –

- (a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by

the wrongful exercise of the freedoms and rights of individuals;

- (b) ...enabling any other thing to be done which promotes or preserves the national interest in general.

The learned Judges dismissed as untenable the contention of the appellant that the provisions of Section 111(2) and (3) of the Act are discriminatory on the ground that they deny equal access to the High Court because they place a private election petitioner and the Attorney General on unequal footing on the matter of depositing a sum of money as security for costs. They said:

The Petitioner supports his proposition by contending that adherence to the rule of law demands equal treatment before the law in terms of article 13(1) of the Constitution and the extent that a legal provision which is discriminatory in itself or its effect is prohibited by article 13(2) of the Constitution. We quite agree that is a correct proposition of the law but we hasten to say that litigation, including election petitions involving the Government, are governed and or regulated by a specific legislation, the Government Proceedings Act 1967 as amended whereas, as correctly submitted by the learned Senior State Attorney, litigants' costs against the Government are more than secured under Section 15 of that Act. We are of the considered view that such a practice is more of an exception than outright discrimination as alluded to by the petitioner. There is therefore no violence done to Article 13(1) and (2) of the Constitution which basically guarantees equality before the law.

A little later, the learned Judges concluded their consideration of the arguments of counsel. They said:

We agree that the spirit behind the amendment of Section 111 of the Elections Act, 1985 was intended to ensure that respondents in election petitions are protected in terms of costs which they are forced to incur in defending their cases. We are not persuaded that the amendment was either intended to introduce a new aspect unknown to law or precondition to curtail the right to fair hearing and equality before the law. For we reiterate that the legal requirement for payment of security for costs is well established and accepted in many jurisdictions where the rule of law is vigorously followed. We on the other hand find it desirable to introduce such adequate safeguards for a petitioner (sic) which is not able to give the prescribed security for costs. Essentially this is what is provided for in Rule 11(3) of the Election (Elections Petitions) Rules 1971 which we believe is still in force and applicable. For the avoidance of doubt we advise that the wording of rule 11(3) of the Election (Election

Petitions) Rules, 1971, be also uplifted and introduced in the provisions of Section 111 of the Elections Act, 1985.

As already indicated, Kimaro, J., found herself unable to share her brethren's views on the Constitutional status of the challenged statutory provision. She held that the provisions of section 111(2) and (3) of the Act are violative of the Constitution. In the course of her dissenting ruling, she said:

By any standard the provisions of Section 111(2) and (3) have been made arbitrarily and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. The impression created by the provisions is that they are safeguards of interests of few people.

Dealing with the argument of counsel for the Attorney General that the amount of money required to be deposited as security for costs is not excessive, the learned Judge said:

My view is that the amount of money required to be deposited as security for costs being excessive, it is only few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned, will be curtailed. Accessibility to justice will be open to only those who can afford to pay security for costs.

The appellant now says that Kyando and Ihema, JJ., misdirected themselves in law in finding no merit in his petition, and Kimaro, J., was right in dissenting from that view. Before us he was represented by Prof. Shivji, who was assisted by Messrs Maira, Rweyongeza and Magafu. The High Court's decision is impugned on the following six grounds of appeal.

1. The trial Judges erred in law and in fact in holding that the right to access to Court as provided under Article 13(1) of the Constitution of the United Republic of Tanzania is fulfilled by simply filing the pleadings and payment of requisite Court fees.
2. The trial Judge erred in law and in fact in not holding that the principle of equality before the law as contained in article 13(1) and 13(6) (a) of the Constitution of the United Republic of Tanzania means that all persons must have free access to Court and must be equally protected from discriminatory pre-conditions which curtail the right to be heard.
3. The trial Judges erred in law and in fact in holding that the mandatory pre-condition of payment of Tshs.5,000,000 as per section 111(2) of the Elections Act, 1985, is realistic, reasonable and necessary to achieve legitimate purpose of securing respondent's costs in a Petition without taking into account that the majority of Tanzanians are poor.

4. The trial Judges erred in law and in fact in not holding that implementation of Section 111(3) of the Elections Act, 1985, is discriminatory in nature rather than an exception as natural persons are mandated to deposit security amounting to **Tshs.500,000,000/=** for costs unlike the Attorney General.

5. The trial Judges erred in law and in fact in not holding that section 111(2) and (3) of the Elections Act, 1985, have been made arbitrarily and the limitations therein are unreasonable and unfair to the citizens of Tanzania.

6. The trial Judges erred in law and in fact in not holding that the mandatory pre-condition for security for costs as provided under section 111(2) of the Elections Act, 1985, operates as to stultify or curtail the right to fair hearing [of] an ordinary citizen who cast his vote.

Prof. Shivji argued 1st, 2nd, 3rd and 6th Grounds of Appeal together, and the remaining two grounds also together. Mr. Mwidunda, Senior State Attorney, who appeared, together with Mr. Salula, for the respondent Attorney General, adopted the same method of presentation of his arguments. We hope we are not misrepresenting or failing to do justice to counsel if we seek to summarise their submissions.

Dealing with Grounds of Appeal 1, 2, 3 and 6, and citing Article 13(1) and (6) of the Constitution; *Farooque v Secretary of the Ministry of Irrigation, Water Resources & Food Control (Bangladesh) and others* [2000] LRC 1; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah and Another* [2000] 1LRC 301, among other authorities, the learned advocate for the appellant pressed us to attach special importance to the right of unimpeded access to justice. In this connection, he called our attention to a number of passages from some judgments from various cases, including *Balakrishnan's case supra* in which, speaking for the Court of Appeal of Malaysia, Gopal Sri Rama, JCA, said:

.... We are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. Were it otherwise, the protection afforded by arts 5(1) and 8(1) of the Federal Constitution will be illusory and the language of the supreme law no more than high sounding words of no practical significance.

Prof. Shivji challenged the Constitutionality of Section 111(2) of the Act with great force. He submitted that the statutory provision creates almost an insurmountable obstacle to the exercise of the right of access

to justice because a trial of an election petition is made contingent upon paying the deposit. According to counsel, the requirement, which leaves no discretion in the court, is a violation of Article 13(1) and (6) of the Constitution. Relying on a passage in the judgment of the High Court of Hong Kong in *Harvest Shee Ltd. & Another v Collector of Stamp Revenue*, 2CHRLD 246, the learned advocate submitted that “if a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place.” He went on to contend that a petitioner in an election petition cannot ask the High Court to summon the aid of the provisions of Rule 11(3) of the rule in his favour. The sub-rule provides:

(3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that-

- (a) the petitioner give such other form of security as the court may consider fit; or
- (b) the petitioner be exempted from payment of any form of security for costs:

Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf.

Prof. Shivji contended that a petitioner cannot now make an application referred to in the sub-rule because, as the learned advocate put it, the sub-rule has, by necessary implication, been repealed by Section 111(2) of the Act. Mr. Mwidunda’s response to these arguments was an uncompromising one. He sought to combat the arguments by contending that section 111(2) of the Act does not in any way constitute an impediment to access to justice; what its provisions do is to balance rights and duties of litigants in election petitions. Treating Article 30(2) (a) and (f) of the Constitution as the sheet-anchor of his response, the learned Senior State Attorney went on to submit that Section 111(2) and (3) was enacted to ensure that the rights and freedoms of petitioners in election petitions are not used to the prejudice of respondents in those proceedings as far as costs are concerned. According to the learned Senior State Attorney, the provisions of Section 111(2) of the Act meet the test of reasonableness of a restriction on a fundamental right, laid down by this Court in *Pumbun’s* case *supra*. Very fairly, however, he conceded that the **Hansard** does not disclose the criterion which was used in

fixing five million shillings as the amount of deposit to be made. Mr. Mwidunda further submitted that, contrary to Prof. Shivji's contention, Section 111(2) has not abolished the discretionary power of the High Court under Rule 11 of the Rule to direct that a petitioner provide some other form of security or to waive the requirement to deposit Tshs. 500/= as security for costs. According to the learned Senior State Attorney, the requirement of depositing five million shilling does not limit the right of access to justice in election petitions.

Making his submissions on the 4th Ground of Appeal, Prof. Shivji contended that Section 111(3) of the Act is discriminatory against a private petitioner because the Attorney General is exempted from being required to make a deposit for security for costs. According to the learned advocate, whether the Government Proceedings Act is applicable to election petitions or not, the private petitioner is discriminated against because an award for costs against the Government is most unsecure. Mr. Mwidunda's response to this argument was that s. 15 of the Government Proceedings Act protects the interests of a decree-holder in a case against the Attorney General; the costs of such a litigant are more than secure. The learned Senior State Attorney also sought to meet Prof. Shivji's challenge of the Constitutional validity of Section 111(3) of the Act by submitting that the discrimination envisaged under Article 13(5) of the Constitution does not include the alleged discrimination in the Section because the vice frowned upon by the Constitutional provision is one relating to natural persons.

In support of the 5th Ground of Appeal, Prof. Shivji submitted that the requirement in Section 111(2) of the Act, complained against by the appellant, is arbitrary in two respects: (1) it does not leave any discretion in the Court; (2) the amount was fixed arbitrarily. Putting it interrogatively, the learned advocate asked: Why was not the amount fixed at 10 million shillings or at 50 million shillings? He reminded us that costs of litigation cannot reasonably be fixed before trial. He then went on to submit, citing *Director of Public prosecutions v. Daudi Peter* [1993] T.L.R.22, that a restriction on a fundamental right must serve legitimate purpose and has to be proportionate. According to the learned advocate, the net in Section 111(2) has been cast too widely, and the statutory provision should, therefore, be struck down as being unconstitutional. Mr. Mwidunda, calling our attention to the fact that litigation costs have been on the rise in this country, valiantly contended that the sum of five million shillings cannot, in the circumstances, be

said to be arbitrary. If the appellant finds it impossible to raise that amount it is open to him, the learned Senior State Attorney went on to submit, to ask the High Court to invoke its discretionary power under Rule 11(3) of the Rules in his favour. It will be recalled that the learned Senior State Attorney had earlier contended that the provisions of that sub-rule are still in force.

We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing Constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr. Justice E.O. Ayoola, a former Chief Justice of The Gambia, in his paper presented at a seminar on the Independence of the Judiciary, in Port – Louis, Mauritius, in October 1998:

A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.

Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound principle of Constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of Constitutionality of a legislation, save where a claw back or exclusion clause is relied upon as a basis for Constitutionality of the legislation, the onus is upon those who challenge the Constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a claw

back or exclusion clause in doing so, the onus is on them; they have to justify the restriction.

With the above principles, among others, in mind, we proceed to deal with the arguments addressed to us. Convenience, we think, requires that we commence with Mr. Mwidunda's argument on the true application of Article 13(5) of the Constitution. It will be recalled that it was the learned Senior State Attorney's submission that the provisions of the sub-article have nothing to do with discrimination against juristic persons. Who, we ask, are the intended beneficiaries of the principle of equality before the law, embodied in Article 13 of the Constitution? Mr. Mwidunda's answer would be: **Natural persons only**. According to the learned Senior State Attorney's submission, the principle does not relate to juristic persons or collective bodies. We have given anxious and careful consideration to this submission and in the upshot we are of the settled opinion that, though not lacking in attractiveness, it is without merit. But, first, let us quote the sub-article. Correctly and literally translated the provision should read (we think the official translation of it is not entirely correct):

(5) For the purpose of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and being subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary conditions, provided that the expression "discriminate" shall not be so construed as to prevent the Government from taking deliberate steps aimed at solving problems in society. (the underlining is supplied)

The language in this provision has exercised our minds considerably, but in the end we are satisfied that the use of the word 'and' immediately after the word "inferior" could not have been intended, for, so read, the provision would not make much sense. The framers of the Constitution, it seems to us, bearing in mind the wording of the provision, intended the provision to comprise two limbs. They must, therefore, have intended to use the word "or" immediately after the word "inferior". If that word is taken to be used there, it cannot be doubted, in our opinion, that the definition of the expression "discriminate" in the provision also embraces juristic persons and collective bodies. We are emboldened in the view that the definition was not intended to relate to natural person

only by the fact that, while in Article 12 of the Constitution the framers used the expression “human being”, in Article 13(4) and (5) they chose to use the expression person/s”. The use of those two different expressions strongly suggests to us that the framers intended to make a distinction between the beneficiaries of the principles underlying the two Articles. It appears unlikely that they would have been indifferent to discrimination which juristic persons or collective bodies might be subjected to. While we recognise that the wording of a relevant Constitutional provision is important in determining whether the Constitution treats juristic persons and collective bodies as beneficiaries of the principle of equality before the law, we wish to draw attention to a footnote in the book, *The Irish Constitution*, 3rd ed., by J.M. Kelly and Gerry Whyte, in which the learned authors disclose, at p.722, the way the courts in Germany and Italy have applied the principle on the aspect of beneficiaries. The footnote, No. 53, reads:

The position reached in Ireland, on the mere strength of a narrow interpretation of the phrase “as human persons,” should be contrasted with that reached in Germany and Italy in respect of the “equality before the law” guarantee in the Constitutions of those countries. In both jurisdictions it has been for many years clear that juristic as well as natural persons are entitled to the benefit of the rule; and (in Germany) that even groups with no legal personality, such as political parties, may rely on it. The concise reasoning of the Italian Constitutional Court in a case about associations for the assistance of disabled persons may be cited: “An unjustified discrimination between the different associations must inevitably have repercussions on the legal sphere of the members, and so must amount, even if only indirectly, to a violation of the equality of the citizen” (Corte costituzionale 1966/25). It is true that this conclusion is facilitated by article 2 of the Constitution, which guarantees the inviolable right of man “whether as an individual, or in the social formations in which his personality unfolds”: but this is simply a handsome pleonasm. The every word “citizen” carries within it the recognition that the subjects of the legal system exist within a society.

In an appropriate case a juristic person may, in our opinion, complain before the High Court of a violation of the principle of equality before the law.

We observed at the beginning of this judgment that, essentially, this appeal is about access to justice. That right has, for a very long time and in many jurisdictions, been regarded as one of the most important rights

a person is entitled to enjoy in a democratic society. Even in England, where, legislative powers of Parliament have been regarded by courts to be unlimited, the right of access to justice has been jealously guarded by the courts. More than eighty years ago, in *In Re Boaler* [1915] 1K.B.21, Scrutton, J., emphasized the importance of that right. He said, at p. 26:

One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least erroneous meaning unless clear words are used to justify such extension.

The importance of the right has also been emphasized in many other English cases, including *Chester v Bateson* [1920] 1K.B.829; *R. & W. Paul Ltd. v The Wheat Commission* [1937] A.C. 139; *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government and Others* [1960] A.C. 260, and *Raymond v Honey* [1983] A.C.I. In *Pyx Granite Co.'s case* (supra), Viscount Simonds expressed the emphasis in the following celebrated words, at p.286:

It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as Mc Nair, J. called it in *Francis v Yeiewsley and West Drayton Urban District Council* [1957] 2Q.B.136, 138; [1957] 1 All E.R.825, a "fundamental rule" from which I would not for my part sanction any departure.

While in England a person's right to unimpeded access to courts can be limited by mere express enactment, in Tanzania that right can be limited only by a legislation which is not only clear but which is also not violative of the provisions of the Constitution. Having considered the importance of access to courts in the context of circumstances prevailing in Bangladesh, Rahman, J., in Farooque's case *supra*, said, at p. 31:

Effective access to justice can thus be seen as the most basic requirement, the most basic 'human rights' of a system which purports to guarantee legal rights.

We agree with Prof. Shivji (we did not hear Mr. Mwidunda expressing a view contrary to that submission) that the Constitution rests on three fundamental pillars namely, (1) rule of law; (2) fundamental rights; and

(3) independent, impartial and accessible judicature. These three pillars of the Constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof. Shivji, it is access to justice, which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day. About two years ago, delivering his judgment in *Chief Direko Lesapo v (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla*, Case CCT 23/99, with which the rest of the members of the Constitutional Court of South African agreed, Mokgoro, J., said, at p.15:

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.

Access to courts is, undoubtedly, a cardinal safeguard against violations of one's right, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.

We deem it logical, before examining the question whether Section 111(2) of the Act is violative of Article 13(2) of the Constitution, to deal first with the issue whether, as was very manfully contended by Mr. Mwidunda, Rule 11(3) of the Rules, as amended by the Elections (Election Petitions) (Amendment) Rules, 1981, and the Elections (Election Petition)(Amendment) Rule 1996, is still in force. Prior to the enactment of the section, the High Court had a discretionary power to direct either that a petitioner in a Parliamentary election petition give such form of security it considered fit, or that the petitioner be exempted from payment of any form of security for costs. We propose, in the interests of clarity and for the sake of completeness, to quote the Rule in *extenso*. It reads:

11. - (1) The Registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court, as security for costs, a sum of five hundred shillings in respect of each respondent.

- (2) Where any person is made a respondent pursuant to an order of the court, the petitioner shall within such time as the court may direct or if the court has not given any direction in that behalf, within seven days of the date on which the order directing a person to be joined as a respondent is made, pay into the court a further sum of five hundred shillings in respect of such person.
- (3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that: -
 - (a) the petitioner give such other form of security as the court may consider fit; or
 - (b) the petitioner be exempted from payment of any form of security for costs:

Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or where there are two or more respondents, to each of the respondents to make representations in that behalf.

(4) No security for costs shall be payable by a petitioner who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association.

Drawing our attention to the fact that the rules were saved by s. 129(b) of the Act when the legislation under which they were made was repealed, Mr. Mwidunda strenuously argued that sub-rule (3) was not repealed or amended by the Electoral Laws (Miscellaneous Amendments) Act, 2000, and is therefore, still in force. By that Act, Parliament enacted, among other things, section 111(2) and (3), the Constitutionality of which the appellant challenged before the High Court. As already pointed out, Prof. Shivji pressed us to hold that the sub-rule was, by necessary implication, repealed by the Section.

In spite of the soldierly courage which he demonstrated while arguing this point, Mr. Mwidunda has not succeeded to persuade us that Rule 11(3) of the Rules is still in force. We entertain no doubt that Prof. Shivji's contention that the sub-rule is no longer in force is incontrovertible.

Why do we hold that view? The we will tell. It is an established principle of common law that rules must be read together with their relevant Act: see *A.G v De Keyser's Royal Hotel* [1920] A.C.508, 551, per Lord Moulton. Rules cannot repeal or contradict express provisions in the Act from which they derive authority: see *Ex p. Davis* (1872) L.R.7 Ch. 526. Dealing with that point in that case, James, L.J., said, at p. 529:

If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act. (the emphasis is ours)

It is also a well-established principle of law that where an Act passed subsequently to the making of the rules is inconsistent with them, the Act must prevail unless it was plainly passed with a different object and then the two will stand together: *Britt v Buckingham CC* [1964] 1 Q.B.77, 78. In their book, *Interpretation of Statutes and Legislation*, 7th ed., at p.157, Mahesh Prasad Tandon and Rajesh Tandon make the same point by saying:

Where a later enactment or a subordinate legislation is so inconsistent with or repugnant to an earlier enactment or subordinate legislation that the two cannot co-exist, then the latter one would effect repeal of the former by implication.

A later Act can, by implication, restrict the scope of a regulation which has been brought into force under an earlier Act: *Kruse v Johnson* [1898] 91, 94, per Lord Russel of Killowen, CJ. We readily agree with Prof. Shivji that Section 111(2) of the Act has, by necessary implication, repealed Rule 11(3) of the Rules. If Parliament had intended that the High Court continue having the power it had under the sub-rule, it could easily have added a provision in the section identical with or similar to the sub-rule or one saving the sub-rule. It seems clear that the law – making authority wanted to abolish the power and make it a rule without exception that each petitioner, regardless of his financial standing, must deposit the sum of five million shillings as security for costs before his petition can be fixed for hearing. We have no doubt that the subsection and the sub-rule are inconsistent with each other, and, therefore, they cannot co-exist or stand together.

For the reasons we have given, we have reached the unhesitating conclusion that, contrary to the views expressed by Kyando and Ihema, JJ., on the point in their ruling, Section 111(2) of the Act has, by necessary implication, repealed Rule 11(3) of the Rules, and therefore,

the High Court no longer has the power to prevent or mitigate the rigours of the subsection by directing either that a petitioner give such form of security as it considers fit or that the petitioner be exempted from payment of any form of security for costs. Therefore, unless we are satisfied that the subsection is not, as submitted by Mr. Mwidunda, violative of the Constitution, a Parliamentary election petition cannot, under any circumstances, be heard or tried before the petitioner pays into the High Court, as security for costs, a sum of five million shillings in respect of his petition. It must also be correct to say, as we do, that the provisions of sub-rule (4) 11 of the Rules have also, by necessary implication, been repealed by section 111(2) of the Act. It will be recalled that sub-rule (4) exempted a petitioner who was granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Women Lawyers' Association from paying security for costs in respect of his petition. It means that now even such petitioners must deposit a sum of five million shillings as security for costs. Having arrived at these conclusions, we must now turn our attention to the question whether subsections (2) and (3) of section 111 of the Act are unconstitutional.

Keeping in view the principles of Constitutional interpretation we alluded to earlier, can it be said that those statutory provisions are violative of Article 13 of the Constitution? Prof. Shivji valiantly attacked Kyando and Ihema, JJ's conception of the right of access to justice. Referring to the requirements for paying or depositing security for costs under Order 25 Rule 1(1) of the Civil Procedure Code and Section 111(2) of the Act, the learned Judges said:

It is pertinent to note that in both situations the party required to pay or deposit security for costs will have already accessed the Court by filing his/her pleadings and paid the necessary court fees.

With great respect to the learned Judges, we cannot agree that access to justice constitutes mere filing of pleadings and paying the required court-fees. The right to have recourse or access to courts means more than that. It includes the right to present one's case or defence before the courts. It cannot, therefore, be correct to say that once he files his petition a petitioner in an election petition has enjoyed the whole of his right of access to justice. Access to justice is not merely knocking on the door or a court. It is more than that.

Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the

limitations must not be arbitrary, unreasonable and disproportionate to any claim of State interest: see *Pumbun's case supra*. Under the Constitution, an individual's fundamental right may have to yield to the common weal of the society. What is observed by Dr. Durga Das Basu in his book, *Shorter Constitution of India*, 12th ed., at p. 104, in connection with the Constitution of India is entirely applicable to our own Constitution. The learned author states:

There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

Personal freedoms and rights must necessarily have limits, for as a Learned Hand also rightly remarked in his eloquent speech on *The Spirit of Liberty*, cited by Khanna, J., in his judgment in *His Holiness Kesavananda Bharati Sripadanagalavaru v State of Kerala and Another* [1973] Supp: S.C.R.1:

A society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few...

Prof. Shivji submitted, as will be recalled, that section 111(2) of the Act is arbitrary and violates the principle of equality because it unreasonably classifies petitioners into two groups: those who can cause the Registrar of the High Court, by paying a deposit of the sum of five million shillings as security for costs, to fix the hearing dates of their petition, and those who can only sit by as they watch the files of their petitions accumulate dust because they cannot pay the deposits and there are no statutory provisions which empower the Court to waive the requirement to make the deposits. While he appeared to concede that section 111(2) of the Act constitutes a restriction on the right of access to courts, Mr. Mwidunda contended that, having been passed to protect respondents from frivolous or vexatious petitions, and to ensure that those litigants

recovered their expenses incurred while defending themselves if eventually the petitions are dismissed, the statutory provision cannot be said to be arbitrary or unreasonable. What is the test of reasonableness in this context? We find the observations of the Supreme Court of India in *State of Madras v V.G. Row* [1952] SCR 597 very helpful, if we may respectfully say so, in answering that question. Speaking by Patanjali Sastri, CJ, the Court said, at p. 607:

The test of reasonableness ... should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

We also find very useful the following passage from the judgment of Barnett, J., in *Harvest Sheen Ltd.'s case supra*, at p. 13:

...the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access [to the courts] left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved...

Applying the test stated in these two passages, we are of the settled opinion that section 111(2) of the Act is arbitrary. According to subsection (1) of the section, an election petition may be presented by, among others, a person who lawfully voted or had a right to vote at the election to which the petition relates. Many of such voters would be persons who cannot possibly raise even one-tenth of the required five million shillings as security for costs or for any other purpose. Bearing in mind the minimum wage in the Civil Service, which we can take judicial notice of under section 58 of the Evidence Act, 1967, a minimum wage-earner will require literally more than all his eight years' wages to pay five million shillings. When this fact is borne in mind, it cannot, in our opinion, be disputed that it is utterly impossible for an indigent voter to pay five million shillings as required by section 111(2) of the Act. The statutory provision, therefore, effectively denies access to justice to indigent petitioners. Is the infliction of this extreme disability on an indigent voter or candidate justified? We have no hesitation in answering that question in the negative. Mr. Mwidunda strenuously contended

that the provisions of the statutory provision are justified on the ground that they prevent the filing of frivolous or vexatious petitions and also they ensure that respondents in election petitions recover their litigation expenses in the event the petitions are unsuccessful. We find no merit in this argument. First, fundamental rights and costs of litigation should not be weighed in the scales against each other. Secondly, we think that the answer to the learned Senior State Attorney's argument is partly to be found in a statement by Lord Macaulay in his criticism of a preamble of a Bengal Regulation of 1795 which purported to justify court fees on the ground of discouraging frivolous variety of litigation. The statement, quoted by C.B. Srinivasan in his book, *Towering Justice*, at p.380, reads:

... It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that will be determined according to bad laws or bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of Justice.

Thirdly, as was pointed out by Mr. Justice (ret'd) Chandrachud in his article, *Fundamental Rights in Their Economic Social and Cultural Context*, published in the *Journal of Developing Human Rights Jurisprudence*, at p. 142:

The fact that a forum for justice is misused does not justify the closing of the doors of justice.

Abolishing the right of an indigent petitioner to apply to the High Court for a direction that either he give some other form of security, or he be exempted from payment of any form of security for costs, and repealing the provisions of Rule 11(4) of the Rules which provided that no security for costs were payable by a petitioner who had been granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association amount, in practical terms, to closing the doors of justice to such seekers of legal remedies. To such petitioners, the right of access to justice becomes meaningless. Be that as it may, there appears to be no explanation why the so-called protection of respondents is not made available to respondents in litigation not arising from elections.

The repeal of Rule 11(3) and (4) of the Rules has, as we have endeavoured to demonstrate, effectively classified those who are aggrieved by the results of a Parliamentary election and have a right to file a petition before the High Court into two distinct groups, namely, those who, because they can afford to pay a deposit of five million shillings, will be able to have their petitions heard by the Court, and those who, as a result of their poverty, the doors of justice will be firmly shut against them. It is not a principle of law that all laws must be of universal application or that the State has no power of distinguishing or classifying persons or things for the purpose of legislation. What the law demands is that any classification or differentiation must have a rational nexus to the object sought to be achieved by the legislation in question. What is forbidden by Article 13 of the Constitution is class legislation and not reasonable classification. The legislative power to make differentiation or classification is important, for, as Prof. M.P. Jain states in his book, *Indian Constitutional Law*, 4th ed., at p. 472:

All persons are not equal by nature, attainment, or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising on an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.

It is, of course, for the courts to decide whether a classification adopted by a law is reasonable or not. The judicial antennae must be sensitive to any classification with a view to ensuring that the classification is rational. To be assured of a bright future a country must have its foundations of justice and equality truly and firmly laid. It is salutary to remember – and here we gratefully adopt the words of Rahman, J., in *Farooque's case* *supra*, at p. 28, as our own:

If justice is not easily and equally accessible to every citizen there then can hardly be a rule of law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a *sine qua non* for the maintenance of the rule of law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the rule of law.

Frivolous or vexatious litigation is undoubtedly, a detestable thing. But the right way to deal with that evil is not to close the doors of justice, but to depend upon courts invoking their inherent or statutory jurisdictions to strike out actions of that nature. The doors of justice must always be left open even to the poorest man or woman in the country. Section 111(2) of the Act is likely to stultify *bona fide* petitions from indigent persons.

Having paid due attention to counsel's arguments, we are satisfied, for the reasons we have endeavoured to give, that Kyando and Ihema, JJ, erred in holding, as they did, that section 111(2) of the Act is not unconstitutional. In our view, the statutory provision is a class legislation. It is also arbitrary and the limitation it purports to impose on the fundamental right of access to justice is more than is reasonably necessary to achieve the objective or preventing abuse of the judicial process. Plainly, Parliament exceeded its powers by enacting the unconstitutional provision. Legislative competence is limited to making laws which are consistent with the Constitution. These conclusions are sufficient to dispose of the appeal, but we consider it useful to say a word or two on the arguments addressed to us concerning the exemption granted to the Attorney General by section 111(3) of the Act.

The importance of the role of the Attorney General in his capacity as the guardian of public interest cannot, in our opinion, be over-emphasized. But the problem arising from section 111 of the Act is not that the statutory provision purports to exempt the Law Officer from giving security for costs, but by repealing Rule 11(3) of the Rules, that it purports to deprive a petitioner of his right, under the sub-rule, to apply for an exemption. As far as legislative discrimination is concerned, what is decisive is not the phraseology of the statute but the effect of the legislation. However, since we have held that subsection (2) of the section is unconstitutional, it follows, as day follows night, that Rule 11(3) is still in force, and therefore, a petitioner still has a right to apply for an exemption. In practical terms, therefore, an ordinary petitioner cannot be said to be subjected to discrimination by section 111(3) of the Act. In the circumstances, we agree with Kyando and Ihema, JJ, though for different reasons, that the subsection is not violative of the provisions of Article 13(2) of the Constitution.

For the foregoing reasons, in our opinion, this appeal must succeed. Allowing the same with costs, we reverse the decision of the High Court and declare that section 111(2) of the Elections Act, 1985, is

unconstitutional and, therefore, devoid of any legal force *ab initio*, that is to say, from the date of its enactment. For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared, the provisions of Rule 11(3) or the Elections (Elections Petitions) Rules, 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the Court in favour of petitioners. One of the results of Section 111(2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a Parliamentary election petition is still five hundred shillings. Bearing in mind the decline of the value of the shilling which has taken place since 1971, when the Rules were made, it cannot be disputed that that sum is now too little to serve any useful practical purpose in terms of providing security for costs, but it is not within the competence of this Court or any other court, for that matter, to amend the Rule.

DATED at DARES SALAAM this 14th day of February, 2000.

B.A. Samatta
CHIEF JUSTICE

R.H. Kisanga
JUSTICE OF APPEAL

K.S.K. Lugakingira
JUSTICE OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

ISSA ATHUMANI TOJO

versus

REPUBLIC [1988] TLR 48

SAMATTA CJ, MAKAME AND RAMADHANI JJA

28 JUNE 2001

Dicta of Dixon J in *R v Wilkes* (1948) 77 CLR 511 at 518, of the court in *Mraz v R* (No. 2) (1956) 96 CLR 62 at 68-8, of Lord Devlin and Lord Hodson in *Connedlly v DPP* [1964] 2 All ER 401 at 436 and 430, of Lawson J in *R v Hogan* [1974] 1 QB 393 at 401, of Alagiriswami J in *Masud Khan v State of Uttar Pradesh* [1974] 1 SCR 793 at 795, *Gopal Prasad Sinha v State of Bihar* 1971 SC 458 and *Ravinder Singh v State of Haryana* AIR 1975 SC 856 applied; *DPP v Humphrys* [1977] AC 1 not followed.

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Indian Evidence Act, 1972, s 115

Tanzania

Appellate Jurisdiction Act, 1979, as amended by the Appellate Jurisdiction (Amendment) Act 1993, s 4(2)

Arms and Ammunition Ordinance, Cap 223, s 13(1)

Criminal Procedure Act 1985, ss 137, 192, 280(1)(a) and 312(1)

Economic and Organised Crimes Control Act 1984, ss 21, 59(2)

Evidence Act 1967, s 123

Judicature and Application of Laws Ordinance, Cap 453, s 2(2)

Penal Code, Cap 16, s 311

Primary Courts Criminal Procedure Code, s 52(2)

Written Laws Miscellaneous Amendments Act, 1989

Other sources referred to in judgment

Lanham *Issue Estoppel in English Criminal Law* [1970] Cr L R 428 at 440

Phipson on Evidence, p 1037, fn 22

Sarkar and Ahmed *Law of Evidence* (4th edn) pp 1223, 1315

Appeal

Issa Athumani Tojo appealed from the judgment of the High Court (Kyando J) on 4 April 1994 dismissing his appeal against his conviction in the District Court of unlawful possession of a firearm and ammunition and sentence of seven years' imprisonment. The facts are stated in the judgment.

Appellant unrepresented.

Mrs Mkwizu Senior State Attorney for the respondent.

28 June 2001. The following judgment of the court was delivered.

SAMATTA CJ.

This is an appeal by Issa Athumani Tojo from a judgment of the High Court (Kyando J) dismissing his appeal and upholding his conviction on a charge of unlawful possession of a firearm and three rounds of ammunition, contrary to s 13(1) of the Arms and Ammunition Ordinance as read together with ss 21 and 59(2) of the Economic and

Organized Crime Control Act 1984 and the Written Laws Miscellaneous Amendments Act 1989, and also upholding a sentence of seven years' imprisonment. One of the appellant's co-accused, Yahya Abdallah, who was also found guilty, did not appeal against his conviction.

A novel point of law, namely whether the doctrine or principle of issue estoppel is applicable in criminal cases in this country arises in this appeal, but we shall first cull out of the record the essential facts of the case which have given rise to that issue. Happily, those facts are not complex. Most of them were, in fact, not in dispute. They may, we think, be narrated as follows. In April 1990 one Hakem Jetha, a resident of Morogoro, was robbed of his rifle and some other property by a group of persons. On 22 December 1990 the firearm was recovered by a team of policemen who, following a tip their leader had received from an informer to the effect that some men were planning to perpetrate a robbery, pounced upon six men, including the appellant and Yahya Abdallah, who were in a house, owned by the appellant, situated within Morogoro town. The six men were arrested in various parts of the premises. The appellant's arrest was effected by one D/Sgt Gabriel, in the presence of Corporal Ramadhani. When the room from which, according to the testimony of D/Sgt Gabriel, the appellant had emerged immediately before his arrest, was searched by the police, Hakem Jetha's stolen rifle was found therein, lying on the floor underneath a bed. Being in possession of this evidence the police charged the six men before the District Court of Morogoro with robbing Hakem Jetha off his rifle. The appellant and his co-accused protested their innocence. The learned trial magistrate acquitted all the six accused of the charge, but convicted the appellant and Yahya Abdallah of the offence of receiving stolen property, contrary to s. 311 of the Penal Code, and sentenced each of them to three years' imprisonment. Aggrieved by that decision, the appellant appealed against it to the High Court. Mkude J allowed the appeal, quashed the conviction and set aside the sentence imposed thereon. Exercising revisional powers, he quashed Yahya Abdallah's conviction and set aside the sentence imposed thereon. The learned judge held that the evidence laid in the scale against the appellant and Yahya Abdallah was insufficient to constitute a basis for making a finding that the two men were found in possession of Jetha's rifle. In the course of his judgment he said:

It seems to me that before a person can be convicted of the offence under s 311 of the Penal Code it must be shown that he "received" the property which was feloniously or unlawfully obtained and he did so with

knowledge, actual or constructive, that the property was feloniously or unlawfully obtained. It is not enough, as it happened in the present case, that a person owns the house in which the stolen property is found by the police. In that case the element of receiving has not been shown, let alone the knowledge that the property had been feloniously or unlawfully obtained. The rule in *Mwangi Njoroge v R* [1963] EA 624 is that where there is no direct proof of theft or of receiving goods knowing them to have been stolen, the ordinary rule of circumstantial evidence must be applied, namely, that the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible. As it happened in this case the gun was found in a room in which several other people were found and so no such irresistible inference can be drawn.

The police were undaunted by Mkude J's decision. On 18 March 1991 they preferred a charge of unlawful possession of the rifle and three rounds of ammunition, before the District Court, against the appellant and his five co-accused. The basis of this new charge was still the alleged possession by the accused of Jetha's rifle. The appellant and his co-accused unsuccessfully raised a plea of *autrefois acquit* under s 280(1)(a) of the Criminal Procedure Act, 1985. As already pointed out, at the end of the trial, the District Court convicted the appellant and Yahya Abdallah as charged and sentenced each of them to seven years' imprisonment. The appellant was of the view that his plea of *autrefois acquit* ought to have been sustained. He appealed against the District Court's decision to the High Court on the ground, *inter alia*, that the learned trial magistrate had strayed into an error in law in rejecting his plea. Like the learned trial magistrate, Kyando J found no merit in the plea. In the course of his judgment he said:

... I fully agree myself that the appellant was acquitted in a case charging him with robbery and not in one charging him with [offence] in this case. His plea of *autrefois acquit* therefore has no substance or merit and the trial court rightly rejected it. I hereby reject it too.

Before us the primary contention of the appellant who was, as was the position in the two courts below, unrepresented, is that his plea of *autrefois acquit* was sustainable. His grievance is that Kyando J misdirected himself in law in holding, as he did, that the District Court had directed itself correctly on that plea. Since we were inclined to be of the opinion that the plea of *autrefois acquit* was not available to the appellant in this case, in the interests of justice, we invited Mrs. Mkwizu, Senior State Attorney, to address us on the question whether the doctrine

of issue estoppel applies to criminal trials in this country and, if it does, whether it is applicable in the instant case. The crux of the statement of that doctrine may be stated in the words of Lawson J in *R v Hogan* [1974] 2 All ER 142 at 145:

Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties.

In order to invoke the doctrine of issue estoppel the parties in the two trials must be the same and the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reargued in the subsequent trial: see *Ravinder Singh v State of Haryana* AIR 1975 SC 856. The principle differs from the *autrefois* principle, embodied in ss 137 and 280(1) (a) of the Criminal Procedure Act. The difference is described by Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 436 as follows”

... The difference between issue estoppel and the *autrefois* principle is that while the latter prevents the prosecution from impugning the validity of the verdict as a whole, the former prevents it from raising again any of the separate issues of fact which the jury have decided, or are presumed to have decided, in reaching their verdict in the accused’s favour.

There is no provision in the Criminal Procedure Act or the Evidence Act, 1967, which embodies the principle of issue estoppel. What is embodied in ss 137 and 280 of the former Act is, as already pointed out, the *autrefois* principle, and what is embodied in s 123 of the latter Act, the Evidence Act, is estoppel by declaration, act or omission.

Can the principle of issue estoppel be invoked in a criminal case? Placing reliance on an observation made by S K Sarkar and Ejaz Ahmed in their book *Law of Evidence* (4th edn), Mrs. Mkwizu invited us to answer that question in the negative. The observation (at p. 1223) reads: ‘Rule of estoppel is not applicable to criminal cases.’

With great respect, we are unable to accept the learned Senior State Attorney’s invitation. The statement relied upon by Mrs. Mkwizu, namely, that the rule of estoppel is not applicable to criminal cases,

to support her argument, is clearly made in reference to estoppel by declaration, act or omission as embodied in s. 115 of the Indian Evidence Act 1872, which is in *pari materia* with s 123 of our Evidence Act. The view that the observation relied on by the learned Senior State Attorney has no relevance to the principle of issue estoppel is reinforced by the learned authors' observation (at p. 1315), which is almost a repetition of a passage in the judgment of the Supreme Court of India in *Masud Khan v State of Uttar Pradesh* [1974] 1 SCR 793 at 793:

Principle of issue estoppel is simply this: where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different and distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.

In our opinion, this passage leaves no doubt that in India issue estoppel is applicable to criminal cases. There is a stream of authority from that country plainly demonstrating that, contrary to Mrs. Mkwizu's submission, *issue estoppel* is applicable in criminal cases. Those cases include *Gopal Prasad Sinha v State of Bihar* AIR 1971 SC 458, *Masud Khan* (above) and *Ravinder Singh v State of Haryana* AIR 1975 SC 856. In *Masud Khan v State of Uttar Pradesh* [1974] 1 SCR 793 at 795 the Supreme Court, speaking through Alagiriswami J. said:

The principle of *issue estoppel* is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an *estoppel* or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.

The Supreme Court, having quoted a passage from the opinion of the Privy Council in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, proceeded, a little later, to quote the following passage from the judgment of Dixon J (sitting in the High Court of Australia) in *R v Wilkes* (1948) 77 CLR 511 at 518 – 519, the report of which, unfortunately, is not available to us:

... it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner ... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation.

The passage was also quoted with approval by Lawson J in *R v Hogan* [1974] 2 All ER 142 at 147 – 148. The Supreme Court also cited with approval the following; passage from the judgment of the High Court of Australia in *Mraz v R* (No. 2) (1956) 96 CLR 62 at 68 – 69.

The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings ... the law which gives effect to *issue estoppel* is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact ... It is enough that an issue and issues have been distinctly raised or found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other.

In our opinion, it is not of little significance to observe, as we do, that in Canada, too, the principle of *issue estoppel* has been applied to criminal cases: see footnote 22 at p. 1037 of Phipson on Evidence. In the USA, too, the principle may afford protection to an accused person: see the references to *Sealfon v United States* (1948) 392 US 575 made in both *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 and *R v Hogan* [1974] 2 All ER 142.

Does issue estoppel avail an accused person in England? To this question we now turn our attention. Until the appeal in *DPP v Humphrys* [1976] 2 All ER 497 was determined, it seemed settled that under the English law an accused could invoke the principle of *issue estoppel* against the

prosecution. In *Hogan* Lawson J entertained no doubt that *issue estoppel* applied to criminal proceedings. He held that the plea applied with mutuality between the Crown and the defendant in such proceedings and could operate when the relevant issues were determinable with precision and certainty by reference to the earlier record and what occurred in relation to them in the course of the previous proceedings. In *Connelly* three of their Lordships, Lord Morris of Borth-y-Gest, Lord Hodson and Lord Pearce were of the view that the principle applied to criminal proceedings. Lord Devlin, however, specifically dissented from that view. In the course of his judgment Lord Hodson said [1964] 2 All ER 401 at 430):

Thus, so far as *autrefois acquit* is concerned the appellant must fail unless he can persuade your lordships to make a further extension of the principle which justice requires. This he has sought to do by reliance on issue estoppel, which has been referred to of recent years more often in other countries than our own, but is an aspect of the law which, I think, lies behind the application of the principle *autrefois acquit*. It was recognized *pro tanto* in the *Sambasivam* case [1950] AC 4587 and the appellant is entitled, if he can, to bring himself within it.

Thirteen years later, however, the House of Lords, in *DPP v Humphrys* [1976] 2 All ER 497, departed from the views expressed by the majority in *Connelly* and held that issue estoppel, in the form in which it operates in civil cases, has no role to play in criminal trials. The facts of that case are accurately summarized in the headnote, which reads:

The respondent was charged with driving a motor vehicle on July 18, 1972, while disqualified. The only issue at the trial was whether a police officer was correct in identifying the respondent as the driver of a motor vehicle on that day. In evidence, in answer to a question, the respondent denied driving any motor vehicle during 1972. He was acquitted. Later he was charged with perjury, the allegation being that at the first trial he had willfully made a statement which he knew to be false, *viz*, that he did not drive any motor vehicle during 1972. The same police officer was a prosecution witness, with others, at the second trial. The judge, rejecting a plea of *issue estoppel* raised by the defence, allowed the police officer to give evidence again identifying the respondent as the driver of the motor vehicle which he had stopped on July 18, 1972. The respondent was convicted.

The Court of Appeal allowed Humphry's appeal against conviction, holding that the doctrine of *issue estoppel* applied. The House of Lords reversed that decision. As already pointed out, their Lordships departed

from the views of the majority in *Connelly* and held that issue estoppel, in the form in which it operates in civil cases, has no application in criminal cases. The difficulty of identifying issues in a criminal trial (conducted in England), because of the absence of pleadings, and the fact that verdicts given by the jury in these cases are of general character, appear to have weighed fairly heavily on their Lordships' minds in arriving at their decision. In the course of his judgment, Lord Salmon said ([1976] 2 All ER 497 at 525):

The doctrine of *issue estoppel* is complex and highly technical, even where applied to civil proceedings alone. In this field, however, it is firmly entrenched and performs a useful function. It brings finality to litigation. The whole procedure relating to pleadings in the civil courts is appropriate for defining with precision the issues between the parties. Once these issues have been ascertained and fought out and then finally adjudicated upon in the courts, it would be unjust and absurd if the disappointed party, save in certain exceptional circumstances which I need not recite, were allowed to reopen the issues and start litigating them all over again. It is in the public interest that litigation should have an end.

His Lordship went on to say ([1976] 2 All ER 497 at 525):6

In the criminal field, however, besides being complex and technical, the doctrine of *issue estoppel* would, in my view, also be inappropriate, artificial, unnecessary and unfair. It would be inappropriate because there are no pleadings defining the issues and no judgments explaining how the issues (even if identifiable) were decided. Sometimes, as in the present case, it would be possible to identify the issues. But it would rarely be possible to do so. Since juries give general verdicts "guilty" or "not guilty" it would often be difficult, if not impossible, to do more than guess how they had decided any issue capable of identification.

Lord Edmund-Davies also alluded to the difficulties pointed out by Lord Salmon. He said ([1976] 2 All ER 497 at 530 – 531):

It is not surprising that, at an early stage in the expression of his doubts, Lord Devlin said [in *Connelly*] at 436: "The main difficulty about its application to criminal trials is that as a rule there is no determination by the jury of separate issues; and so their conclusion on any issue can be reached only by an analysis of the general verdict". That verdict is, in the vast majority of cases, simply one of "guilty" or "not guilty". *Connelly v DPP* [1964] 2 All ER 401 is itself an example of how frustrating the effort to analyse the issues can be, while the Australian decision in *Mraz v R*

(No. 2) (1956) 96 CLR 62 illustrates how subtle such an analysis may be. Unlike on the civil side, there are no formal pleadings and, if more than one issue is involved, it can indeed be difficult to ascertain upon which particular issue or issues the jury found for or against the accused. And the difficulty may be enormously increased in relation to decisions in the magistrates' courts, unless they state the reasons for their decisions, which they are not generally obliged to do.

A little later, his Lordship said:

But, even if the decisive issue can be isolated, as in the present case, Mr David Lanham has powerfully demonstrated (see *Issue Estoppel in the English Criminal Law* [1970] Crim LR 428 at 440) that: "The difficulty is that once the principle of issue estoppel is recognized in cases where the issue is easy to discern ... there is a danger that it will be applied in cases where it is inappropriate". *Sambasivam v Public Prosecutor, Rederation of Malaya* [1950] AC 458, to my way of thinking, illustrates the difficulty.

Courts in this country are empowered by s 2(2) of the Judicature and Application of Laws Ordinance to apply the common law as it existed in England on 22 July 1920. Authorities, including *R v Hogan* [1974] 2 All ER 142 and *Connelly v DPP* [1964] 2 All ER 401, appear to us to demonstrate that prior to 1977, when the House of Lords, in *DPP v Humphrys* [1976] 2 All ER 497 reversed the earlier decision, the common law recognized the application of the doctrine of *issue estoppel* in criminal cases. We are not persuaded that the difficulties of applying the doctrine in criminal cases, alluded to by their Lordships in *Humphrys*, exist in our country. It is true, of course, that no pleadings are framed in criminal cases in this country. But bearing in mind the mandatory provisions of s 192 of the Criminal Procedure Act, which require a trial court, before the trial commences, to identify issues which are not in dispute, and taking into consideration the provisions of s 312 (1) of the Act and s 52(2) of the Primary Courts Criminal Procedure Code, which enact that judgments must contain points for determination, the decision thereon and the reasons for such decisions, we are of the settled opinion that the primary considerations which moved their Lordships in *Humphrys* to depart from what the majority of their Lordships in *Connelly* had held to be the law on application of the doctrine of issue estoppel in criminal cases have no weight in our country, where the jury system does not apply.

As regards the danger of the doctrine being applied in cases where it is inappropriate, we are content to observe that the doctrine should not be given universal applicability. If its application in certain situations is likely to give rise to injustice, the solution is not to exclude its

application entirely, but to limit it to cases in which it would promote fairness. As was rightly observed by Lawton J in one of his interventions in the course of argument of counsel for the Crown in *Connelly* in the Court of Criminal Appeal (see [1964] AC 1267), ‘it would be deplorable that a defence available in civil cases would not be available in identical circumstances in a criminal matter’.

The judgments delivered in *Hogan* and *Connelly* do not, however, show that before 22 July 1920 the common law recognized the application of the doctrine of *issue estoppel* in criminal cases. We find the reasoning in the judgment of Lawson J in *Hogan* and that of the majority in *Connelly* so persuasive that, assuming that before the reception date the common law did not recognize the application of the doctrine in criminal law, we are prepared to invoke the proviso to s 2(2) of the Judicature and Application of Laws Ordinance, modify the common law, and hold, as we do, that in this country the doctrine applies in criminal cases.

Keeping in view of what we have said, we pass to consider the facts of the instant case. One of the issues in the appellant’s second trial was the same as that in the first trial, *to wit*, whether the appellant and his co-accused had been in possession of Jetha’s rifle. Mkude J, as will be recalled, answered that issue in the negative. We entertain no doubt that, for reasons we have endeavoured to give, the prosecution was bound to accept the correctness of that finding and was precluded from taking any step to challenge it at the subsequent trial. In other words, the prosecution was estopped in the second trial from seeking to prove that, contrary to Mkude J’s finding, the appellant and his co-accused were found in possession of Jetha’s rifle. The mounting of the prosecution against the appellant and his co-accused in the second trial was inconsistent with what is right. Kyando J should have allowed the appeal before him.

For the reasons we have given, we allow the appeal, quash the appellant’s conviction and set aside the sentence imposed thereon. Exercising revisional powers conferred upon this court by s 4(2) of the Appellate Jurisdiction Act, 1979, as amended by the Appellate Jurisdiction (Amendment) Act, 1993, we quash Yahya Abdallah’s conviction and the sentence imposed thereon. As the two men are, as far as this case is concerned, out of prison, we make no order for their release. Though the appellant and his co-accused will derive no practical advantage from our decision, they are entitled to have their convictions expunged from records.

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MFALILA, J. A., LUBUVA, J. A., AND SAMATTA, J. A.)

Civil Appeal No. 24 of 1999

Between

LUTTER SYMPORIAN NELSON

APPELLANT

And

1. THE HON. ATTORNEY GENERAL

RESPONDENT

2. IBRAHIM SAID MSABAHA

(APPEAL FROM THE DECISION OF THE HIGH COURT
OF TANZANIA AT DAR ES SALAAM)

(MKWAWA, J.)

DATED THE 6TH DAY OF MAY, 1998

IN

Misc. Civil Cause No. 124 of 1995

JUDGEMENT OF THE COURT

SAMATTA, J. A.:

The appellant, Lutter Symphorian Nelson, and the 2nd respondent, Dr. Ibrahim Said Msabaha, were two of the nine candidates in the Kibaha constituency for election to the National Assembly in the general election held in this country on October 29, 1995. They were put forward by Chama Cha Demokrasia na Maendeleo, popularly known by its acronym, CHADEMA, and Chama Cha Mapinduzi (CCM), respectively. The Returning Officer declared the 2nd respondent, who

polled 17,621 votes, as the winner of the election. The appellant was declared to have polled 11,915 votes. The rest of the valid votes were shared by the remaining candidates. The appellant was aggrieved by the 2nd respondent's election. He challenged it before the High Court under sections 111 (c) and 112 of the Elections Act, 1985 (hereinafter referred to as "the Act"). The petition was dismissed. The appeal now before us is against that decision.

The appellant's grounds of challenge were many; they included the following: (1) delay in opening and premature closure of some of the polling stations; (2) illiterate and blind voters being assisted by CCM zealots in casting their votes; (3) failure to post the appellant's particulars at some of the polling stations; (4) illegal campaign; (5) treating; (6) intimidation; (7) corrupt practices; and (8) campaign exploiting tribal differences. The trial was a protracted one. Twenty seven issues were framed and a total of fifty-two witnesses testified, twenty-one of whom were called by the appellant, who gave evidence on his own behalf. In this appeal only the learned trial Judge's findings in respect of the 5th to 8th grounds of challenge, inclusive, are being contested. Originally, there were two grounds of appeals, namely:

1. The Honourable Judge erred in law and in fact in holding that the appellant has failed to prove his case beyond all reasonable doubt in respect of the allegations relating to tribalism, corrupt practices, treating and intimidation of the electorate.
2. The Honourable Judge erred in law and in fact in holding that the CCM (Chama Cha Mapinduzi) had not planted zealots at Miswe "B", Mbawawa Primary School "A", and "B" and Vikuruti to assist the blind, deaf and illiterates.

The 2nd ground of appeal was abandoned by Mr. Magafu, Counsel for the appellant, and marked withdrawn by the Court. So, we are left with only one ground of appeal.

We consider it useful to state at this juncture some of the general principles of law which we shall keep in view while considering the merits or otherwise of the appeal. The following are those principles:

- (1) The burden is heavy on him who assails an election which has been concluded. He must prove his case beyond reasonable doubt. But as Lord Oaksey observed in *Preston-Jones* [1951] 1 ALL E. R. 124, at p. 133, "... What is a reasonable doubt is always difficult

to decide and varies in practice according to the nature of the case.” The standard of proof depends upon the seriousness of the allegation made.

- (2) Although a trial court cannot be treated as infallible in determining which side is indulging in falsehoods or exaggerations, an appellate court will not lightly disturb its findings of fact. It will disturb those findings only if they are clearly unsound, perverse or have been based on grounds which are unsatisfactory by reason of material inconsistencies or inaccuracies. Although a first appeal is a re-hearing, the trial court’s findings of fact will be interfered with only if they are wrong.
- (3) A finding boldly based on demeanour alone is not satisfactory. In the absence of legal litmus tests to discover the truthfulness or otherwise of oral evidence, the trial court must have regard to the general probabilities and broader aspects of the case as to where the truth lies in the case. Where there is a conflict of evidence or where the evidence of the witnesses is likely to be unreliable, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to the trial court in ascertaining the truth: see *Grace Shipping Inc. and Another v C. F. Sharp & Co. Malaya (pte) Ltd.* [1987] LRC (Comm) 550.
- (4) While it is not right to dismiss outright evidence of partisan witnesses, that evidence must be viewed with great care and caution, scrutiny and circumspection.
- (5) Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. As the learned authors of SARKAR ON THE LAW OF EVIDENCE, 10th ed., Vol. I, aptly put it, at p. 46:

“Trifling discrepancies should be ignored as they are often a test of truth. Several persons giving their versions of a transaction witnessed

by them are naturally liable to disagree on immaterial points. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in the weighing of evidence.”

Having stated these principles, we proceed to consider the validity or otherwise of the criticisms which Mr. Magafu has forcefully made against the learned trial Judge’s findings, and arguments tenaciously made on behalf of the 2nd respondent by Mr. Mselem in support of those findings. The second ground of appeal, the one which concerned the Attorney General, having been abandoned by Mr. Magafu, Mr. Salula, Principal State Attorney, merely assisted the court on one point of law which we shall later have occasion to consider in the course of this judgment. We propose to deal with the complaints against the learned Judge’s findings on the four subject-matters raised in the remaining ground of appeal, namely, treating, intimidation, corrupt practices and tribalism *seriatim*.

In so far as the issue of treating was concerned, it was the appellant’s case at the trial that rice-meals commonly known as “pilau” were served by the 2nd respondent’s campaign meetings at Mlandizi A and B, Disunyara Village, Mwendapole, kwa Mfipa, Msanganyi, Mkuza, Bokomonemela, Mengindu, Vikawe, Kongowe, Ruvu Station and Mlandizi Kwa Dosa. The food was served either before or after the rallies. The following witnesses on the appellant’s side gave evidence on treating: Rehema Sudi Sadi (PW2), Salum Leja (PW4), Said Zinga (PW6), Rajabu Yusuph Athumani (PW7) and Kinyama Songo Ulaiti (PW19). It was the appellant’s case that the message accompanying the “hospitality” was that the consumers should cast their votes for the 2nd respondent. According to the appellant’s testimony a total of about twenty five thousand people ate the PILAU. The 2nd respondent’s defence was total denial that food was served to members of the public. He asserted that only members of his campaign groups, which included choirs and one traditional dance group, were served with food, the funds for which were supplied by his Party, friends and supporters. He called six witnesses: Ali Nassoro Rufumba (RW11), Hamisi Ramadhani Chanzi (RW14), Simba Saidi Simba (RW22), Kassumu Ahmad Liyame (RW26). Each one of these witnesses supported the 2nd respondent’s denials and assertions. In the course of his evidence RW26 said: “I am the one who supervised the distribution and consumption of the meal by the choir groups. Each group had an average of twenty (20) participants. On the average five plates of pilau meal were consumed by each group.... The meals were

not eaten in the open. They were always eaten inside the provided buildings. These were invariably CCM's offices. The meals were not meant to be eaten by the public. They were exclusively for choir groups. The learned trial Judge analysed the evidence of the scales of justice and found himself unable to make a positive finding that, as was alleged by the appellant and his witnesses, the pilau was also served to members of the public. He entertained the view that what might have occurred was that pilau was prepared for, and served to the members of the campaign groups but some members of the public invited themselves to the meal. He accordingly found no substance in the complaint against treating. Mr. Magafu sought to persuade us to hold that the learned Judge erred in so concluding. While very fairly conceding that the evidence of PW 6 was hearsay, he contended that the evidence of PW2 stood unchallenged on the point, and PW6 was unshaken during cross-examination, and, therefore, the learned trial Judge should have preferred the evidence of those two witnesses to that of the 2nd respondent, which, according to counsel, constituted general denials. Mr. Magafu concluded his submission on the issue of treating by contending that what occurred at the named rallies constituted treating in law. Mr. Mselem, on the other hand, urged us to hold that the learned trial Judge directed himself properly and arrived at a correct conclusion. He submitted that the evidence of the 2nd respondent, RW12, RW13, RW23, RW25 and RW26 established that members of the public were not served with the pilau. The learned advocate concluded his argument by submitting that if there were gatecrashers in the places where the pilau was served, the 2nd respondent cannot in law be condemned for that.

We have carefully considered the rival arguments and in the end we are of the opinion that, upon the evidence on the record, it cannot be said that the learned trial Judge was not entitled to find, as he did, that treating was not proved in this case. None of the appellant's witnesses told the trial court that members of the public were invited to go and eat the pilau. In the course of his testimony, PW7 was constrained to admit that no invitation was made at the rally he attended, namely, the Mwendapole rally. In the light of these facts, it seems to us that the version given by the 2nd respondent and his witnesses was more plausible. Since the onus of proof in this case lay on the appellant, we have no hesitation in concluding, as did the learned trial Judge, that treating was not proved. As was held by this Court in (1) *Gilliard Joseph Mlaseko* (2) *Dr. Aziz K. Ahmed and* (3) *Waikela B. Rehani v* (1) *Corona Faida Busongo*

and (2) *The Attorney General*, Civil Appeal No. 57 of 1996 (unreported), the serving of food to members of election campaign teams is a perfectly lawful thing. We can detect no fault in the learned trial Judge's findings on the complaint against treating.

We proceed to consider whether the learned Judge misdirected himself in holding that intimidation was not proved. The appellant called four witnesses to prove several alleged episodes of intimidation by the 2nd respondent and his agents. The first of those episodes was alleged to have taken place at Mlandizi. It was the evidence of Iddi Saidi Wenge (PW14), a vendor at Mlandizi Market, that during the campaign period Ibrahim Ismail Kambanyaka (RW16), a Ward Councillor, came to the market in the company of one Morris Foeks, and told the traders at the market that if they voted for the appellant they would find themselves paying higher fees for their business licences. In his testimony RW16 denied to have made the alleged "threat". He said that at the market vendors paid a daily fee of Ss. 50/= and a monthly fee of Tshs. 300/=. These charges, according to the witness, were levied by the District council and not CCM. In the course of his submission Mr. Magafu conceded that the alleged statement by RW16 did not in law constitute intimidation because CCM was entitled, if it found it necessary, to caution the people that a victory for CHADEMA could result in business fees being raised. In view of that concession of which we approve, we say no more on the matter. Another intimidation was alleged to have been made at Visiga Kwa Vipofu. The evidence here was given by one Sijaoni Athumani Mzuzuri (PW12). His testimony was to the effect that on September 28, 1995, on the eve of the polling day, a video film depicting what he called "the Uganda War" was shown to an audience of "almost one hundred persons". He asserted that he was the one operating the video-set. According to the witness' testimony, the film included horrifying scenes of killings, and that a Ward Councillor, one Omari Rashid Nonganonga (RW19), cautioned the audience that if they voted for the opposition parties what they had seen on the film would befall this country. The 2nd respondent brought RW19 and one Salum Rajabu Muhunzi (RW18) to refute PW12's evidence. Both witnesses said nothing about where they were or what they did on September 28, 1995. Apparently assuming that PW12 meant to talk of the events which occurred on October 28, 1995, they asserted that on the night of that day they were at Ruvu Secondary School attending an election seminar. The evidence of an Assistant Returning Officer, Suleiman Mfaume Bigi (RW21), who claimed to have been the supervisor of the seminar, supported the testimony of

the two witnesses. This support moved the learned trial judge to hold that there was no “powerful evidence to establish the complaint”. Mr. Magafu submitted that that finding was not justified. He contended that the evidence of PW12 was reliable and enough to establish the electoral misconduct complained against. Mr. Mselem submitted that the learned trial Judge’s finding cannot be faulted, because, as he put it, there was sufficient credible evidence before the court proving that RW18 and RW19 were at the Ruvu Secondary School on the night in question. With respect to Mr. Magafu, we are of the opinion that the rejection by the learned trial Judge of PW12’s solitary testimony was justified. First, according to his evidence, the appellant was told that the film was screened on October 28, 1995. This information appears to have come from PW12. That witness was, however, emphatic in his evidence that the “show” took place on September 28, 1995, and not on October 28, 1995. Under cross-examination by Mr. Mselem, who also represented the 2nd respondent at the trial, the witness said, among other things: “I am telling the truth – election was held on the 29-9-95. The film was screened on the 28/9/95. This was just a night before the Election Day. I had operated the video machine. The house of Mhunzi is in the compound where the video was screened. The video was not shown on the 28/10/95. It was in the month of September, 1995 (the emphasis is ours). Plainly, the witness was confused. As everyone else knows, the general election did not take place in the month of September. Was the witness’ confusion confined to dates? We cannot be sure of that. In our settled opinion, the learned trial Judge would not have been justified to accept PW12’s unimpressive testimony. It is not, in our opinion, insignificant that none of the members of the audiences, estimated by the witness to be almost a hundred, was called as a witness to support that evidence. Be that as it may, we are decisively of the opinion that, in the absence of evidence proving, or from which it could reasonably be inferred, that a substantial number of votes were obtained as a result of the alleged intimidation, the appellant’s complaint must be found to lack merit.

One Dr. Zainabu Gama (RW28), an Assistant Medical Officer employed by Shirika la Elimu, Kibaha, was alleged by Asha Juma (PW18) and Salum Issa Kinyogori (PW21), both of whom are residents of Miswe Village, to have uttered a threat that if the residents of the village voted for the appellant or if that candidate won the election she would refuse to attend them if they came to the hospital for treatment. PW21 told the trial court that one night, a few days before the election day, the

village and CCM Chairman, Sahabana Chaurembo, brought Dr. Gama to his (the witness') house. As to what allegedly transpired there, we shall permit the witness to take up the story:

"She [Dr. Gama] arrested me. In the process she asked me why I have [defected] from CCM to CHADEMA. She told me as I had been there was no point why I should abandon it. She further told me that there we should not be unwise to vote for LUTTER who is a Bahaya. She further threatened that people from Miswe Village will be denied treatment in her hospital in case LUTTER NELSON emerged the winner in the election. She also asked me to inform my co-villagers to attend a meeting on the following morning".

The witness was the Chairman of CHADEMA at the village. Dr. Gama was a Regional and District Executive Committee member of U.W.T., an organisation affiliated to CCM. She was also a member of the Political Committee of that Party at the regional and district levels. PW18 testified to the effect that, in response to an invitation by the village Chairman, one morning before the polling day she attended a women's meeting. About fifty women attended it. Dr. Gama was the main speaker. As to what Dr. Gama allegedly said, the witness told the trial court as follows:

"She introduced herself to us. Her message to us was briefly to the effect that we should cast our votes for DR. MSABAHA and not LUTTER NELSON. She ... told us that if we elected NELSON then we should be prepared to face the consequences of being turned away when we go to Kibaha for treatment".

While admitting the holding of the meeting, Dr. Gama emphatically denied to have exhorted those present to vote for the 2nd respondent or to have threatened to refuse them medical treatment if they voted for the appellant or if the candidate emerged the winner in the election. Although she admitted to have told the appellant, who passed by the meeting hall, that the meeting was a "mkole", a Zaramo initiation meeting for women, she asserted that the gathering was a UWT meeting. During the meeting, she told the trial court, she exhorted those present to vote for the 2nd respondent. Analysing the evidence of PW18 and that of Dr. Gama, the learned trial Judge said, among other things:

"Taking into consideration RW28's denial in this matter and the way she straightforwardly gave her evidence-in-chief and how unshaken she stood the fiery cross-examination I was left with a lasting impression of sincerity on her part. In the result, I cannot say that she was not a credible witness. I am fortified in this view when I bear in mind that PW18 did

not at all impress me as a witness of belief and that PW18's testimony is, as is evident from the record, lonesome. Having this in mind I find it extremely unsafe to believe PW18 and discredit RW28".

He went on to conclude as follows:

"Even assuming in *arguendo* that RW28 had uttered those threats as alleged by NELSON and his witnesses, I am still not persuaded that such remarks or utterances could have any effect or substantial influence on the electorate".

Mr. Magafu forcefully criticised the learned trial Judge's finding that RW28 was a credible witness. He contended that the witness could not correctly be regarded as being a reliable one. He gave two reasons for that contention. First, in examination-in-chief the witness said that the meeting was exclusively for women but during cross-examination she admitted that a man, too, attended the meeting. Secondly, the witness contradicted herself because at one time she said that the meeting was a "Mkole", but later she said it was a UWT meeting. Mr. Magafu submitted that the learned trial Judge should have preferred PW18's testimony to that of RW28. Mr. Mselem, on the other hand, urged us to hold that the learned trial Judge was entitled to make the finding Mr. Magafu had attacked. According to the learned advocate, the police, to whom a complaint had been made against the witness, would not have been so insouciant as to ignore the contravention if there was some evidence showing that it had been made. The learned advocate did not, however, disclose in respect of what offence the witness could be arrested. We have given a careful consideration to these arguments and in the upshot we are of the opinion that there is no warrant for disturbing the learned trial Judge's finding. As far as the making of the alleged threat is concerned, we think it was one man's word against another. Neither evidence of PW18 nor that of PW21 was supported directly or indirectly. No reason was given at the trial why no other member of CHADEMA or any of the other opposition parties who attended the meeting could not be called to lend some colour to PW18's testimony. According to the evidence of PW21, the meeting was for women "regardless of their party affiliations". Be that as it may, we do not think Mr. Magafu's criticisms against the evidence of RW28 carry much weight. We hold that opinion mainly for two reasons. First, the delay in disclosing to the trial court that there was one man at the meeting intended exclusively for women did not, in our opinion, constitute a substantial blot on the credibility of the witness. Secondly, at no time during her testimony did the witness

say that the meeting was a “mkole”. She used that word in connection with what she had told the appellant when the latter had wanted to know whether the meeting was a public one. Mr. Magafu appears to have misunderstood the witness’ answers to the questions posed by the learned trial Judge. For these reasons, we are of the opinion that there is no basis for interfering with the learned trial Judge’s findings on the intimidation allegedly made by RW28.

Finally, as far as intimidation is concerned, there is the complaint against the rejection by the learned trial Judge of the evidence of PW15, Issa Jumanne Mngombanya, that at the Kwa Dosa campaign meeting threats were made by RW14, RW21 (the Kibaha District Commissioner) and RW27 that those who would not vote for CCM would be dispossessed of their shambas. The evidence was strongly disputed by the defence witnesses and the 2nd respondent. One of the principal common features of their evidence was that the meeting in question did not last long because it started to rain heavily a short period after it had commenced. The learned trial Judge was impressed by the credibility of the defence witnesses. Having given the matter careful consideration, we are unable to agree with Mr. Magafu that, upon the evidence on the record, we are entitled to take a different view from that taken by the learned trial Judge. Having subjected the impugned judgment to close scrutiny, we are unable to say that the learned trial Judge failed to use or palpably misused the advantage he enjoyed, which we lack, of observing the manner and demeanour of the witnesses.

Mr. Magafu strongly urged us to hold that, contrary to the findings made by the learned trial Judge, it was proved beyond reasonable doubt at the trial that the election in the Kibaha constituency was not, because of intimidation by the 2nd respondent and his agents, free and fair. For the reasons we have given, we cannot prevail on ourselves to believe that it would be right for us to accede to the learned advocate’s arguments. That conclusion brings us face to face with the appellant’s complaints against the learned trial Judge’s findings on the evidence to the allegations of corrupt practices.

There were not less than seven alleged acts of bribery by the 2nd respondent and some of his agents. We shall start with the evidence of Kinyama Songo Ulaiti (PW19). This witness was a member of the CCM’s campaign team in the Kibaha constituency. Testifying on what allegedly occurred on October 26, 1995, he said:

“... I was called by the CCM’s branch secretary. He is called SAIDI KOKOTA. He gave [me] Tshs. 20,000/= which he said I should use in luring the voters into casting their ballot in favour of MSABAHA. The notes were all in Tshs. 500 currency notes denomination. I was instructed to give money only to those with registration certificates. I gave each one of these Tshs. 500/=. I gave the money to forty persons. I was not given anything as an inducement. I was to be rewarded later on. I was promised Tshs. 2,000/=. [This money] I was to be paid when MSABAHA wins. I know the persons who I have paid ... I approached the individuals in person and I did it secretly”.

Cross-examined by counsel for the Attorney General, the witness said, among other things:

“I had given [Tshs. 500/=] to one Mkumbwa. He is blind. I took him to the polling station. I left him sitting outside. I left him with my uncle. He is called KIBWANA SULEIMAN KIYANI. I had given him [MKUMBWA] the money three days before the Election Day”. (The emphasis is ours)

Mkumbwa gave evidence as PW16. He confirmed receiving 500/= from PW19, but his story differed from the latter’s story in two respects. First, he said he received the money on the polling day. Secondly, he said it was one Kinyamasigwa who led him to the polling station. The evidence of the two witnesses was disputed by the 2nd respondent’s side. According to Said Kokuza (RW17), pw19 had ceased to be a member of CCM when, on June 6, 1995, he resigned from the Party. The witness produced before the court as an exhibit minutes of a meeting of CCM which were said to demonstrate that fact. Having taken into account the inconsistencies between the evidence of the two witnesses, the learned trial Judge found himself unable to accept the evidence of PW16 and PW19. In his brief attack on that finding, Mr. Magafu submitted that the issue was not who assisted the witness to go to the polling station, but whether PW19 was given Tshs. 20,000/= Mr. Mselem submitted that, bearing in mind the inconsistencies between their evidence and the “lie” by PW19 that he was a member of CCM, the learned trial Judge was perfectly entitled to arrive at the conclusion he did. With respect to Mr. Magafu, we are of the opinion that Mr. Mselem’s argument is well-founded. Assuming that PW19 did not tell a lie on his membership on CCM, his evidence reminds us of the caution voiced by the supreme court of India in *Rahim Khan v Khurshid Ahmed and others* [1975] S.C.R. 643 regarding the acceptance of turncoat testimony in election petitions. Speaking through Krishna Iyer, J., and the Court said, at p. 657:

“We cannot understand how tergiversation can become a virtue. Defection in politics is becoming a pervasive vice and its projection into election cases must be frowned upon by courts. It scandalises us that a person should be the campaign agent of one candidate during elections and should shift loyalties during the election case to undo the victory he contributed to attain. The price of post-election swivelling must slump. It is naiveté to pin faith on such probative circus and it is necessary to discourage such defection in the interests of the purity of the Court process. Except in special circumstances which are not present in the present case we decline to dismantle an electoral result by the technique of turncoat testimony”.

It will be recalled that it was the evidence of PW19 that he was a member of the CCM campaign team. In that capacity, he exhorted the voters in the Kibaha constituency to cast their votes for the 2nd respondent, CCM candidate, and yet, by his own testimony, he tried to persuade the learned trial Judge to declare the 2nd respondent's election void. We can see no special circumstances in this case justifying the acceptance of the evidence of this swivel-chair witness. On the contrary, the very material inconsistencies between his evidence and that of his fellow player, PW16, dictate, in our settled opinion, the rejection of that evidence. It is very difficult to believe that the two witnesses were talking of the same incident when they were in the witness-box. We find no merit in Mr. Magafu's submission.

That conclusion brings us to the question whether the learned trial Judge was wrong in not finding that a few days before a CCM campaign meeting was held at Mwendapole village the 2nd respondent bribed some villagers there. The appellant adduced evidence from two witnesses on the complaint – Rajabu Ali Ngateka (PW10) and Salum Suleiman Difa (PW11). It was the evidence of the two witnesses that on a Sunday morning the 2nd respondent came to their village and parked his vehicle at a bus stand. Soon thereafter a crowd of men and women gathered there. The 2nd respondent addressed them briefly; he exhorted them to vote for him. Then he dipped his hand into his trouser pocket and dished out Tshs. 30,000/= in three currency notes. The crowd scrambled for the money. PW10 grabbed it and threw two of the notes to the crowd. The witness then went to a shop where he changed the note he had retained into Tshs. 5,000/= notes, one of which he gave to PW 11. There were some inconsistencies in the evidence of the witnesses. According to PW11, however, the 2nd respondent also gave women Tshs. 20,000/=. PW11 tried to explain the inconsistency during cross-examination.

He said that the women were given the Tshs. 20,000/= when PW10 had gone to the shop to change the Tshs. 10,000/= he had retained. The 2nd respondent vehemently disputed having bribed the crowd. He asserted that he could not indulge in bribery when his mobilization groups denounced corruption in their songs and poems. The learned trial Judge was not impressed by the evidence of PW10 and PW11. In his opinion, the disharmony between their evidence left a reasonable doubt as to whether the alleged bribery took place. Mr. Magafu attacked this view. He contended that the 2nd respondent's evidence on the issue was no more than a general denial. Relying on (1) *Basil P. Mramba* (2) *The Hon. The Attorney General v Leons S. Ngalai*, Civil Appeal No. 27 of 1987 (unreported), the learned advocate submitted that a general denial of an electoral irregularity or misconduct cannot suffice. He concluded his submission by arguing that the evidence of PW10 and PW11 was credible and proved the alleged bribery beyond reasonable doubt. Mr. Mselem's response was two-fold. First, it was improbable that the 2nd respondent, a man who is highly educated, would have acted in such a reckless manner in broad daylight as described by the two witnesses. Secondly, the unresolvable inconsistencies between the evidence of the witnesses were material and robbed the witnesses' accounts of their persuasiveness. Mr. Mselem concluded his submission by reminding us of the fact that being a very grave charge, corruption ought to be strictly proved.

Whose contention is correct? Mr. Magafu's that bribery by the 2nd respondent was proved? Or is it Mr. Mselem's that there was no such proof. There cannot be doubt that if it is true that the 2nd respondent behaved as alleged by PW10 and PW11 he acted with reckless courage. Like the learned trial Judge, however, we are not satisfied that it was proved that he so behaved. In our opinion, the inconsistency between the evidence of the two witnesses regarding whether or not women were also bribed was not of a trifling character. The belated explanation by PW11 that the bribery occurred when PW10 had gone to the shop flies in the face of the testimony of PW10, which suggested, very strongly, that PW11 accompanied him to the shop. It is not irrelevant to add, we think, that the omission by the appellant to call as a witness at least one of the women who witnessed the alleged bribery gives rise to doubt whether the accounts of PW10 and PW11 were true. We conclude, therefore, that there is no basis for faulting the learned trial Judge's findings on the evidence of PW10 and PW11.

We now turn to a consideration of the appellant's complaint against the learned trial Judge's finding that it was not proved beyond reasonable doubt that Dr. Lawrence Gama, the then Secretary General of CCM, handed over bribe money to PW2. The witness gave a very interesting story. We propose to tell the greater part of it in her own words. This is what she told the trial Court:

"On the 6-10-95 I and two other CHADEMA members attended a meeting at the CCM Lumumba Office in Dar es Salaam. I was a leader in Tumbi Ward. I was a CHADEMA Secretary. The CCM's Party Secretaries for Dar es Salaam and Coast Regions and a chairman for Visiga Village were also present at the CCM Sub-headquarters at Lumumba in the city. With me there were MOHAMED MKANDA and SEIF RASHID. We had all pretended to have deserted CHADEMA in favour of CCM. I was a security agent of CHADEMA. We were directed by the CCM leaders in attendance to entice CHADEMA members to vote for DR. IRAHIM MSABAHA. In order to achieve this objective the former Secretary General of CCM, DR. LAWRENCE GAMA, gave me a bribe of Tshs. 30,000/= and 25 CCM cards. I was directed to offer each person I had enticed a CCM card and Tshs. 1,000/=. The remaining Tshs. 5,000/= was not for luring CHADEMA (sic). It was given to me as transport allowance".

The witness went on to assert that after leaving the CCM Sub-Headquarters she proceeded to CHADEMA National Headquarters where she reported the alleged incident to the Party's Vice Chairman, one Mr. Brown Ngwilulupi. She said she left the CCM cards and Tshs. 25,000/= with that leader. It should also be pointed out that, according to the witness; testimony, her companions, Mohamed Mikanda and Seif Rashid, were also given some money for the same purpose by the Secretary General. In rebuttal, the 2nd respondent called one Abbas Shabani Mfikurwa (RW29). In October 1995 the witness was Personal Assistant to the Secretary General of CCM. He told the trial court that on October 6, 1995, he officiated at a ceremony for welcoming to CCM Kibaha defectors from CHADEMA. He had been told they were two hundred defectors but only thirty would attend the ceremony. He obtained thirty CCM cards for the occasion, but in the end only three "defectors" turned up – PW2, Mikanda and one whose name he could not recall. The witness asserted that on that date the Secretary General was at Songea where he was also involved, as a candidate, in a contest for a parliamentary seat. He went on to tell the trial court that he presented the trio with CCM membership cards and handed over the remaining

cards to one Mr. Mhagama, the Coast Region CCM's Secretary, for distribution to those defectors who had not turned up at the ceremony. According to the witness, the three "defectors" had insisted that the ceremony take place in Dar es Salaam and not Kibaha because they feared to be subjected to harassment by the appellant's followers.

The learned trial Judge subjected the evidence of the two witnesses, PW2 and RW29, to a critical analysis. He said:

"The evidence of PW2 is lonesome as the said BROWN NGWILULUPI was not called to lend credence to her version. If her story is credible, one wonders why he did not come. PW2 had asserted that DR. LAWRENCE GAMA was in attendance on that day but the same is borne out in Exh. R13 [a news report in UHURU issue of October 7, 1995]. Had he been there quite obviously he would have hit the headlines. In the circumstances, of the two RW29 is more credible and worth of belief".

Mr. Magafu made a general attack against the rejection by the learned trial Judge of PW2's evidence. With respect, we agree with Mr. Mselem that the reasons given by the learned Judge for that rejection are incapable of being faulted. In our view, the learned Judge could also have doubted the veracity of the witness' evidence on the additional ground that the unexplained omission by the appellant to call Mohamed Mikanda or Seif Rashid as a witness suggested that the solitary evidence of PW2 was not going to be supported if those persons gave evidence.

The only remaining story of alleged bribery worthy our attention is that given by Faustin Everista (PW5). This witness told the trial court that on the polling day, while he and one Haule and Mohamed were going to a polling station to cast their votes, one Felician Kisutu, a CCM ten cell leader, who was at his house, called them. As to what allegedly happened at the house, we shall tell the story in the witness' own words:

"He [Felician] gave a thousand shillings to each and asked us to vote for Dr. Msabaha. He promised us more money if MSABAHA was elected. He told us that about [Shs]. 200,000/= was available. I cast my vote for MSABAHA. I have not been paid the money todate. I had gone in search of the money".

In his analysis of the evidence laid before him the learned trial Judge made no specific reference to the evidence of this witness. Mr. Magafu, not unexpectedly, attacked the omission. He contended that the witness' evidence was capable of belief. Mr. Mselem, on the other hand, submitted that the witness had told palpable lies and therefore his evidence was

not worthy of the court's consideration. Since the learned trial Judge does not appear to have evaluated the evidence of the witness, we shall discharge that task. In doing so, we remember, of course, that we have not had the benefit of observing the witness; demeanour in the witness – box. As a matter of reason, we think it is unsafe to rely on the witness' evidence. If his story were true, it seems unlikely that counsel for the appellant, an experienced one, would have omitted to call as a witness at least one of the witness' companions (Haule and Mohamed) at the time the bribes were allegedly given. The omission seems to suggest to us that the appellant's side was not sure that if those companions had gone into the witness-box they would have supported PW5's story. We would attach little weight to that story.

Corruption is a grave misconduct, and the allegation of it is a very serious charge. When it is proved in an election petition very serious consequences follow. It must, therefore, be strictly proved. Although the conditions prevailing in this country with regard to elections may not be very similar to those obtaining in India, the observations made by the Supreme Court of that country in Rahim Khan's case *supra*, at p. 656, on the dangers of accepting bare oral evidence on allegations of corrupt practices are, we think, useful here:

“We must emphasize the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. It must be remembered that corrupt practices may perhaps be proved by hiring a dozen witnesses apparently respectable and dis-interested There is no X-ray whereby the dishonesty of the story can be established and, if the Court were gullible enough to gulp such oral versions and invalidate elections, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of kilkennycat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The Court must look for serious assurance, unlying circumstance or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life.”

Cogent and clear evidence is required to prove a corrupt practice in an election petition. The evidence adduced by the appellant in the present case being, as we have demonstrated, of a shaky and pre-varicating character, we are satisfied that the learned trial Judge was perfectly right

to hold, as he did, that no corrupt practice was proved beyond reasonable doubt. We, therefore, see no merit in the appellant's complaint.

Finally, we turn to the appellant's complaint against the learned trial Judge's findings on his (the appellant's) allegations of tribalism. To prove those allegations, the appellant adduced evidence from twelve witnesses. The witnesses were PW2; Collence Wilisoni (PW3); PW4; PW6; PW7; Mohamed Kabondo (PW8); PW10; Ali Chizo (PW13); PW14; Issa Jumanne Magombanya (PW15) and Salum Issa Kinyogori (PW21). Save as for PW21, the essence of the evidence of these witnesses was that at the CCM campaign rallies they attended in the constituency of Kibaha – PW2 and PW6 at Mkuza, PW3 and PW4 at Kwa Mfipa, PW7, PW8 and PW10 at Mwendapole, PW13 at nearly all the rallies, PW14 at Mlandizi, and PW15 at Vikuruto – the 2nd respondent and his agents (in the presence of the former) exhorted the crowds not to vote for the appellant who they described as a Mhaya, Wakuja (non-indigenous person in the area), TX, or foreigner. They urged the people to vote for the 2nd respondent, their fellow Zaramo or Mzawa (a son of the land). According to the witnesses, the choirs and dancing groups conveyed the same message to the crowds. According to PW3, at the meeting he attended, one line of one of the songs ran as follows:

“.... Wazaramo nambari oneWahaya hawana bao.”

The ten witnesses asserted that the following were the 2nd respondent's principal agents whose speeches contained tribalistic messages: RW14, the CCM's District Chairman; RW16, Ward Councillor; RW21, Ward Executive Secretary; and Morris Foeks, who did not give evidence in this case. PW21 testified to the effect that one night before the polling day RW28 (Dr. Zainab Gama) visited his house and exhorted him not to cast his vote for the appellant, a Mhaya. The evidence of PW13 was to the effect that he was a member of one of CCM's campaign choirs. He produced before the court as an exhibit an audio tape which he asserted contained some of the songs which he had taped at some of the campaign rallies. The thrust of the 2nd respondent campaign, the witness asserted, was to portray the appellant as unfit to be Member of Parliament for Kibaha Constituency on the ground that he was not indigenous to that constituency. The appellant himself essentially testified on the reports he received from his agents and supporters.

In the witness-box the 2nd respondent vehemently denied that he or his agents conducted the campaign rallies on the lines of tribe as alleged by the appellant's witnesses or at all. He called nine witnesses to refute

those allegations. Those witnesses were: Alli Nassoro Rufumba (RW11), Athumani Maje (RW12), Deogratia Kishura (RW13), RW14 (Hamisi Ramadhani Chanzi), Msafiri Jackson (RW20), Simba Said Simba (RW22), Abdallah Juma Mbonga (RW24) and Muharami Mohamedi Lubawa (RW25). Each of these witnesses denied that speeches on tribal lines were made at the campaign meetings they attended. According to them, in the speeches and songs voters were exhorted to cast their votes for the CCM Presidential election candidate and the 2nd respondent. RW11, RW12, RW13, RW14 and the 2nd respondent himself asserted that the subject-matter of tribes was touched upon by the speakers at the CCM campaign rallies only for the purpose of demolishing the baseless utterances which the appellant had been making at some of his campaign rallies that, (1) although at the CCM nominations, before he had defected to CHADEMA, he had polled the highest number of votes thereby beating the 2nd respondent by far, he was not nominated by that Party as its candidate in the constituency because he was a Mhaya and not a Zaramo, and (2) the 2nd respondent was a Muha. The 2nd respondent told the trial court that he “found it prudent for the inhabitants of Kibaha to know the truth”. It was not in dispute at the trial that the 2nd respondent is a Zaramo, and the appellant is a native of West Lake Region, who has now settled in the constituency.

On the issue of tribalism the learned trial Judge analysed the evidence of three witnesses only – the appellant, PW13 and RW20. He was silent as to the truthfulness or otherwise of the evidence of PW2, PW3, PW4, PW6, PW7, PW8, PW10, PW14, PW15, RW11, RW12, RW13, RW14, RW22, RW24, RW25, and RW26. We shall quote him in extenso. This is what he said:

“There can scarcely be any doubt that NELSON was an exciting witness. He was in the witness box for a relatively long time. It will be recalled that it is common ground that NELSON in the election poster, sample ballot papers and in his speeches at several campaign rallies described himself as a doctor. It later on transpired that the said credential was spurious and NELSON himself has unblushingly conceded (sic) that his claim in respect of that credential was utter falsity. And I venture to say as a result of this falsehood the court has to approach his evidence with the greatest circumspection. Besides, I could not help but get the feeling that parts of his evidence were assimilations of suspicions and inferences and that there is some likelihood that he was carrying out a vendetta and a jaundiced eye against DR. MSABAHA after being jilted by CCM from the candidature. This being the position NELSON’s evidence should be

suspect. The reason is that he has a palpable interest to serve. At any rate, I think, as already stated NELSON's evidence in respect of this issue was a fusion of suspicions and deductions. I find it difficult to buy the account of PW13 particularly when it is pitted against that of RW20 who I find credible. His evidence finds support in the cassette itself. Most of the evidence given show that during the campaign rallies there was cheering, jubilation and all sorts of applauses. It strains credulity and indeed one wonders why the cassette did not pick a single voice from the crowd, it having been recorded amid a crowd as per PW13 himself. This raises great doubts which should be resolved in favour of DR. MSABAHA”.

Having evaluated the evidence of the three witnesses in that manner, the learned trial Judge concluded his consideration of the issue of tribalism as follows:

“Without prejudice to the foregoing, I wish to further state that on my part it is by no means new or obsolete law that even assuming for argument sake that tribalism was the theme in the campaign rallies, I am far from persuaded that the substantial number of votes were obtained from such utterances bearing in mind the cosmopolitan nature of the constituency. The decision in NGWASHEMI'S CASE [(1971) H. C. D. n. 251] is hereby relevant. I am quite unable to hold that such a situation obtained in the Parliamentary election in the Kibaha constituency. I so find”.

Mr. Magafu made a strenuous attack against the learned trial Judge's reasoning in these passages. He submitted that the learned trial Judge gravely misdirected himself in analysing the evidence because he concentrated on the appellant's evidence. According to the learned advocate, the omission by the learned Judge to evaluate and make findings on the evidence of the other witnesses, other than PW13 and RW20, who testified on the issue of tribalism, was a serious misdirection. Mr. Magafu went on to contend that the evidence of PW2 (who, he said, was not challenged during cross-examination on the issue of tribalism), PW3, PW4, PW6, PW7, PW8, PW15 and PW16 was reliable and ought to have been accepted by the learned trial Judge. The learned advocate described the evidence of the 2nd respondent and his agents as mere general denials, and went on to submit, relying on *Basil P. Mramba's case supra*, that those denials were not sufficient in law to constitute a defence. He invited us to hold that it was proved beyond reasonable doubt that the 2nd respondent and his agents made statements during the election campaign with intent to exploit tribal differences relating

to the appellant and the 2nd respondent, and that the agents made those statements with the 2nd respondent's knowledge and consent or approval. Finally, Mr. Magafu submitted that in considering the effect of the tribalistic statements on the result of the election the learned trial Judge misdirected himself in law because, as he put it, once any of the objectionable statements described in S. 108 (2) (a) of the Act are proved to have been made, the election of the returned candidate must be declared void. According to the learned advocate, the question of the result on the election being affected arises only when the proved complaint is a non-compliance with the provisions of the Act. In his response, Mr. Mselem was ingenuous enough to confess that he was not at ease with the way the learned trial Judge approached his task on the issue of tribalism. He conceded that the learned trial Judge gave no reasons for disbelieving the witnesses other than the appellant, PW13 and RW20, who testified on that issue. The learned advocate nevertheless contended that if he had considered the evidence of those witnesses the learned trial Judge would inevitably have disbelieved it. He reminded us that on the issue of corruption the learned trial Judge found PW2 a liar, and went on to submit that having been so labelled, the witness could not possibly be believed on the issue of tribalism. He pointed out what he regarded as weaknesses on the evidence of the following witnesses of the appellant: PW3 (disharmony with evidence of PW13), PW4 (he admitted to have sold his registration certificate) and PW13 (the audio cassette he produced before the trial court had no sound made by the crowds, a fact which, he said, supported RW20's assertion that it was recorded after the election had been held). Mr. Mselem further submitted that if the assertion by the 2nd respondent and his witnesses that the question of tribalism was commented upon by the speakers of their camp merely for the purpose of exposing the falsity of the allegation which the appellant was making that the 2nd respondent's nomination by CCM as a parliamentary candidate was influenced by tribalism was true, then it could not be said that the statements were made with intent to exploit tribal differences. The learned advocate, who conceded that once a contravention of S. 108 92) (a) of the Act is proved, nullification of the election must follow regardless of the result on it, concluded his argument by submitting that no such contravention was proved in the present case.

Mr. Salula agreed with the interpretation on s. 108 (2) (a) of the Act urged by Mr. Magafu and Mr. Mselem. He invited us to hold that the absence in that paragraph of the test of effect on the result of the election

which is provided in paragraph (b) of the subsection demonstrates that Parliament intended not to have that test applied to statements on the lines of religion, race, tribe or sex. He sought to remind us that, for the sake of national unity, both the Constitution of the United Republic of Tanzania of 1977 (hereinafter referred to as “the Constitution”) and the Political Parties Act, 1992 prohibit discrimination.

We have paid due attention to the submissions made by counsel for all the three parties. Having done so, we are left in no doubt that the learned trial Judge strayed into some serious errors in his treatment of the evidence laid before him on the issue of tribalism. First, he did not apply his mind to the evidence of seventeen witnesses, including that of PW8, PW14 and PW15. A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In *Amirali Ismail v Regina*, 1 T.L.R. 370, Abernethy, J. made some observations on the requirements of Judgment. He said:

A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how”.

Though they were made in a criminal case, we think these observations equally apply to judgements given in non-criminal proceedings. Since, in the present case, the learned trial Judge completely ignored a portion of the material evidence, we shall, unfortunately, embark upon the task of evaluating that evidence without the advantage of his assessment. Secondly, the learned trial Judge misdirected himself in rejecting the evidence of the appellant partly on the ground that the appellant had “a palpable interest to serve” in the case. The fact that, as the returned candidate, the 2nd respondent had equal, if not greater, purpose of his own to serve in the case, seems to have escaped the attention of the learned trial Judge. Thirdly, as we shall demonstrate later, the learned trial Judge erred in law in considering the effect of statements, if proved, made in contravention of s. 108 (2) (a) of the Act on the result of the election.

Although, unlike the learned trial Judge, we did not enjoy the advantage of observing the manner and demeanour of the witnesses when they

were in the witness-box, we are of the settled opinion, having regard to, among other things, the totality of the evidence on the record, the fact that RW26 was recorded by the learned trial Judge to have been evasive at a certain stage of his evidence, and the admission made by RW11 in the course of his evidence, to which we shall shortly revert, that there was no basis for the learned trial Judge not to accept the evidence of PW8, PW14 and PW15. The trio appear to us to have given simple and straightforward stories. They did not embellish those accounts. The evidence of the three witnesses was, among other things, to the effect that at Mwendapole, Mlandizi and Ruvu Kwa Dosa, respectively the 2nd respondent and his agents made speeches exhorting the people not to vote for the appellant a non-Zaramo, but vote for the 2nd respondent, their fellow tribesman. Of course, the 2nd respondent and his witnesses disputed those assertions, but their case that the question of tribes was raised at the CCM campaign rallies only to refute the story the appellant had been telling the crowds at his campaign rallies as to why CCM had not nominated him as its candidate in the constituency was put only to the appellant, who disputed it. We are at a loss to understand why counsel did not put that case to PW2, PW3, PW4, PW6, PW7, PW8, PW10, PW14 and PW15. It seems to us not unreasonable to infer from the omission that counsel realised after the appellant's emphatic denial that it would be futile to pursue the matter. Be that as it may, the evidence of PW8, PW14 and PW15 appears to find some support from the admission made by RW11, the CCM's District Secretary, in his evidence. Under cross-examination by Mr. Swai, for the appellant, the witness said, among other things:

"I concede that there was that tribal difference talk that surrounded the campaign atmosphere".

This admission shows, we think, that, although the witness' heart was with his Party and the 2nd respondent, he did not so lose his head as to avoid telling the trial court that which the 2nd respondent and the rest of his witnesses who testified on the issue of tribalism seemed very reluctant to say. Be that as it may, we think the evidence of PW8, PW14 and PW15 could stand its ground without PW11's admission. To put it differently, we would be prepared to act on the evidence of the trio in the absence of the admission.

It cannot be disputed that the evidence of PW3 (who sold his registration certificate), PW6 (a former prisoner), PW7 (one of the witnesses whose evidence on treating was found lacking veracity), PW10 (the witness

whose story about a bribe of Tshs. 30,000/= the learned trial Judge rightly found unconvincing) and PW13 (the witness whose evidence on recorded tape was rightly doubted by the learned trial Judge, and who was imprisoned in 1993 for assaulting a school teacher) required supporting evidence before it could be acted upon. There is such evidence on the record in respect of the evidence of PW3, PW7, and PW10. That evidence is that of PW8. Bearing in mind the compelling nature of the evidence of PW8, PW14 and PW15, the fact that the allegation that in talking about tribes the 2nd respondent and his agents were merely responding to false statements by the appellant regarding his failure to secure a nomination in CCM was not put to any of the appellant's witnesses, and, finally, the admission made by RW11, we are of the opinion that the learned trial Judge should have rejected the 2nd respondent's camp's version regarding the issue of tribalism. Accordingly, we find as a fact that the 2nd respondent and his agents conducted a campaign on tribal lines as asserted by PW3, PW7, PW8, PW10, PW14 and PW15. We entertain no doubt that those agents did so with the knowledge and consent or approval of the 2nd respondent and that both the 2nd respondent and his agents made those statements with intent to exploit differences between the appellant and the 2nd respondent. In what we regard as a half-hearted submission, Mr. Mselem contended that there was no proof of such intent. It suffices to say on that argument that, upon the evidence, the only rational conclusion is that the statements were made with that intent. Without any hesitation we reject the learned advocate's contention.

The making, during an election campaign, of statements, by the candidate or his agents with his knowledge and consent or approval, with intent to exploit tribal differences pertinent to the election or relating to any of the candidates is frowned upon by S. 108 (2) (a) of the Act. The sub-section reads:

- (1) the election of a candidate as a Member of Parliament shall be declared void only on an election petition [if any] if the following grounds are proved to the satisfaction of the High Court and on no other ground, namely-
 - (a) that during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to exploit tribal, racial or religious

issues or differences pertinent to the election or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference;

- (b) non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result on the election; or
- (c) That the candidate was at the time of his election, a person not qualified for election as a Member of Parliament.” (the emphasis is supplied).

It will be recalled that the learned trial Judge held that in accordance with the principle laid down in *Ngwashemi's case supra* he could not say, assuming that the appellant's complaint was proved, that “the substantial number of votes were obtained from such utterances bearing in mind the cosmopolitan nature of [the] constituency”. With great respect, we are satisfied that the learned trial Judge misdirected himself in law in considering the effect of tribalism in the speeches on the result of the election. When, contrary to s. 108 (2) (a) of the Act, an election campaign is conducted on the lines of tribe, race, religion or sex, the law is jealously qualitative, not clumsily quantitative, in its nullification test. It does not count the number of contraventions, for; one contravention has the same ultimate result as ten contraventions. When there is such proof the question of the contravention affecting the result of the election does not arise. That question arises only if the provision of the subsection which has been contravened is paragraph (b). Contrary to what the learned trial Judge held, *Ngwashemi's case supra* concerned the contravention of paragraph (b) of the subsection and not paragraph (a). The complaints in that case were: (1) more votes were counted than the number of registered voters; (2) failure to keep the poll open at some of the polling stations; (3) failure to provide screened compartments wherein electors could cast their votes secretly; and (4) a substantial number of voters were denied the opportunity to vote. The decision in that case was plainly irrelevant to this case. In its great wisdom, Parliament found it necessary to impose an absolute prohibition of the making by an election candidate, or on the candidate's behalf with his knowledge and consent or approval, of statements with intent to exploit tribal, racial, and religious or sex differences pertinent

to the election or relating to any of the candidate. However big the margin of the victory of the returned candidate may be, if the candidate conducted his campaign, or permitted his agents to campaign, on the lines of any of those pernicious evils, the High Court is bound by the law to invalidate the poll verdict regardless of the effect of the illegal practice on the result of the election: see the very recent decision of this Court in *Azim Suleiman Premji v 1. The Attorney General* (2) Dr. Aman Walid Kabourou, Civil Appeal No. 63 of 1998 (unreported). The law's aversion to short-cuts to power is boundless. We want to say in the clearest terms that it is of first importance that elections should not only be fairly and properly held but should also be seen to be so conducted. John Adams, a renowned jurist, who, between 1797 and 1801, was President of U.S.A is said to have once remarked:

“Remember, remember, democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide”.

The vices prohibited by S. 108 (2) (a) of the Act are capable of posing a very grave threat to the national cohesion and our young democracy. The spirit underlying the provisions of Articles 9 (g) and (h), 13 (4) and (5), 20 (2) (a), 21 (1) and 29 (2) of the Constitution, and section 9 (2) of the Political Parties Act, 1992, is that discrimination on the basis of tribe, race, religion or sex has no place in this country. It is of earth-shaking importance that those cancerous vices be eradicated from the hearts and minds of the leaders and those who aspire to become leaders. The politics of stoop-to-conquer must be denounced with a loud voice.

Upon a close and fresh re-evaluation of the evidence on the record, we are satisfied beyond reasonable doubt that, contrary to the provisions of s. 108 (2) (a) of the Act, the 2nd respondent and his agents, with his knowledge and consent or approval, made statements during the election campaign with intent to exploit tribal differences relating to that candidate and the appellant. For the reasons we have given, we cannot in law pause to consider whether those illegal practices affected the result of the election. A campaign on tribal lines having been proved, the electoral purity must claim its victim. Accordingly, we allow the appeal, reverse the decision of the High Court dismissing the election petition, and declare that the election of the 2nd respondent as a Member of Parliament for Kibaha constituency is void. The 2nd respondent is to pay the costs of the appellant and those of the 1st respondent, both in this Court and the Court below:

DATED at DARES SALAAM this 6th day of September, 1999.

L. M. Mfalila

JUSTICE OF APPEAL

D. Z. Lubuva

JUSTICE OF APPEAL

B. A. Samatta

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

SGD

(A. G. Mwarija)

DEPUTY REGISTRAR

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SAMATTA, C.J., MROSO, J.A., and MUNUO, J.A.)

Criminal Appeal No. 53 of 2001

BETWEEN

HAMISI RAJABU DIBAGULA

APPELLANT

And

THE REPUBLIC

RESPONDENT

(APPEAL FROM THE DECISION OF THE HIGH COURT OF

TANZANIA AT DAR ES SALAAM)

(CHIPETA, J.)

DATED THE 24TH DAY OF AUGUST, 2001

IN

H/C Criminal Revision Cause No. 19 of 2001

JUDGEMENT OF THE COURT

SAMATTA, C.J.:

This is an appeal from a decision of the High Court (Chipeta, J., as he then was) affirming, while exercising revisional jurisdiction, a conviction for uttering words with the intent to wound religious feelings. The appellant, Hamisi Rajabu Dibagula, had been convicted of that offence by the District Court of Morogoro, which sentenced him to 18 months' imprisonment. The learned Judge set aside that sentence and substituted therefor such sentence as was to result in the immediate release of the appellant from custody. The appeal raises one or two

questions of considerable public importance concerning the limits, if any, on the right to freedom of religion, guaranteed under Article 19 of the Constitution of the United Republic of Tanzania, 1977, hereinafter referred to as “the Constitution”.

It is necessary, before we embark upon the task of examining the merits or otherwise of the appeal, to state the facts of the case. They are happily, uncomplicated. They may, we think, be outlined as follows. In the afternoon of March 16, 2000, the appellant, a member of an Islamic organization known as Almallid, and some of his colleagues organized a religious public meeting at Chamwino in Morogoro town. They had secured a “permit”, issued by the Police Officer Commanding District, to organize the meeting. Acting on some information he had received from a member of the public, the Regional C.I.D. Officer of Morogoro Region proceeded to the place where the meeting was taking place. He found the appellant addressing the meeting. At that point in time the appellant was saying (in Kiswahili): “*Yesu si Mwana wa Mungu, ni jina la mtu kama mtu mwingine tu*”. (*Jesus is not the son of God, it is a name of a person like the name of any other person*)

The C.I.D. Officer had no doubt that the utterance constituted a criminal offence under section 129 of the Penal Code. He proceeded to arrest the appellant (his colleagues took to their heels and vanished into thin air) and took him to a police station. Four days later the appellant was taken before the District Court where a charge under the aforementioned section was laid at his door. It was alleged in the particulars of offence that the appellant –

on the 16th day of March 2000 at about 18.00 hrs at Chamwino area within the Municipality, District and Region of Morogoro, with deliberate intention did utter words *to wit*, *YESU si mwana wa MUNGU bali ni jina*, words which are wounding (sic) the religious feelings of Christian worshippers.

Section 129 of the Penal Code provides:

129. Any person who, with the deliberate intention of wounding the religious feelings of any person, utters any word, or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanor, and is liable to imprisonment for one year.

The appellant protested his innocence. He denied to have preached “against the Christian religion”. One Athuman Abdallah, his only witness,

told the trial magistrate that the appellant had urged non-Muslims to embrace Islamic faith and pronounce that Jesus Christ is not the Son of God. At the end of the trial the learned magistrate entertained no doubt of reasonable kind that the evidence laid before her proved the appellant's alleged guilt. After entering a conviction, as already pointed out, she sentenced the appellant to 18 months' imprisonment. The High Court, upon becoming aware of the decision, and in exercise of its powers under section 372 of the Criminal Procedure Act, 1985, hereinafter referred to as "the Act", called for the record of the case for the purpose of satisfying itself as to the correctness of the decision. The Court later proceeded to conduct a revisional proceeding in respect of the case. Only the Director of Public Prosecutions was given opportunity to be heard at that proceeding. At the end of it the learned Judge was satisfied that the appellant has been rightly convicted. He was, however, of the opinion, a correct one in our view, that the sentence of eighteen months' imprisonment was illegal because it exceeded the maximum sentence of twelve months' imprisonment fixed by law for the offence. He set it aside and, as already stated, substituted therefor such sentence as was to result in the appellant's immediate release from custody. Consequently, the appellant regained his personal liberty. He believed, however, that the learned Judge's decision did not constitute a complete triumph for justice. Hence the instant appeal.

The learned Judge's decision is impugned on the following five grounds:

1. The revising Judge erred in law and in fact by holding that the prosecution in [the] lower Court did prove its case beyond reasonable doubt.
2. The revising Judge erred in law by agreeing with the submission of the State Attorney that the Prosecution in the trial Court proved the case beyond reasonable doubt without valuating the evidence tendered in the lower court and assigning reasons therefor.
3. The revising Judge erred in law by not considering the fact that the nature of the offence the Appellant was convicted of presupposes the existence of a person who was directly wounded by the words uttered by the Appellant or that the prosecution should be able to prove who and how a person would have his feelings injured.
4. The revising Judge erred in law in embarking on revisional proceedings in the presence of the Republic but in the absence of the accused person whose legal interests were being looked into by the court.

5. The court erred in law by holding that there was a judgment of the trial court while in fact the so-called judgment was in law not a judgment.

Speaking through his advocate, Mr. Taslima, who was assisted by Prof. Safari, the appellant has strongly urged us to quash his conviction. Mr. Mlipano, State Attorney, declined to support it.

Is Jesus Christ the Son of God? Millions of persons would sharply disagree as to the correct answer to this question. Some would entertain no doubt whatsoever that an answer in the affirmative is the correct one; to others, “No”, would without the slightest doubt, be the correct answer. Whichever is the correct answer, the question is a purely religious one and, therefore, cannot fall for determination by a court of law. It is not, therefore, one of the questions which the instant appeal can possibly answer. The pivotal issue before us is whether merely making an utterance in the hearing of another person that Jesus Christ is not the Son of God constitutes a criminal offence under section 129 of the Penal Code.

Before we proceed to examine the merits or otherwise of the arguments addressed to us by the learned advocates, we deem it useful to state some of the general principles governing the enjoyment of the freedom of religion in this country. The right to that freedom is guaranteed under Article 19 of the Constitution which reads:

19. – (1) Every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion or faith.
- (2) Without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.
- (3) In this Article reference to the word “religion” shall be construed as including reference to religious denominations, and cognate expressions shall be construed accordingly”.

The freedom enshrined in this Article includes the right to profess, practise and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a

person's expression, it must be correct to say, as we do, that freedom of religion is also impliedly guaranteed under Article 18(1) of the Constitution. That freedom, like other freedoms, is not an absolute right. The exercise of it, just as the exercise of other freedoms, is subject to the requirements of public peace, morality and good order, which are requisites of the common good of society. As was pointed out by the Supreme Court of India in *The Chairman, Railway Board and Others v. Mrs. Chandrima Das and Others*, 1 S.C.R. 480, at pp. 501-502, primary of the interest of the nation and security of State must be read into every provision dealing with fundamental rights. The freedom to transmit or spread one's religion or to proselytize has to be exercised reasonably, that is to say, in a manner which recognizes the rights, including religious rights, of other persons. It must be exercised in a manner which demonstrates respect for the freedoms of persons belonging to other religions, atheists and agnostics. In a human society, rights may be in conflict; they must, therefore, be exercised subject to law. As far as human rights and freedoms are concerned, this legal position is succinctly stated in Article 30(1) of the Constitution, which provides:

30. – (1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest”.

Having stated these principles, we propose now to deal with the arguments addressed to us. But before we do so, we desire to observe that the charge which was laid at the door of the appellant in this case was not a model of accuracy or elegance in charge drafting. Some vital words of section 129 of the Penal Code concerning *mens rea* were omitted from the particulars of offence. It leaps to the eye that the words “of wounding the religious feelings of any person” are missing there. Did this omission occasion any miscarriage of justice? We think not. First, the wording of the statement of offence, section and law in the charge reasonably informed the appellant of the requisite *mens rea* of the offence he was charged with. Secondly, judging from the tenor of his defence during cross-examination of the Regional C.I.D. Officer and P.W.4, D/Cpl. Zeno, and his own testimony, it is patently clear that the appellant was aware that it was the case against him that, in uttering the alleged words, his intention, a deliberate one, was to wound the religious feelings of those hearing him. Rightly, his counsel before this Court did not appear to think that any arguable point arose from the omission.

Having made that observation, we proceed to deal with the first ground of appeal. It was forcefully contended by Mr. Taslima that the learned Judge erred in law because, as the learned advocate put it, he did not direct himself on the vital question of *mens rea* in the case. The learned advocate went on to submit that even the learned trial magistrate did not address her mind to that issue. Mr. Taslima drew our attention to Surah 19: 88-91 of the Qur'an, and then proceeded to submit that when he told his audience that Jesus Christ is not the Son of God the appellant was doing no more than preaching his religion. The four verses read as follows:

- “88. They say: “The Most Gracious
Has betaken a son!
89. Indeed ye have put forth
A thing monstrous!
90. At it the skies are about
To burst, the earth
To split asunder, and
The mountains to fall down
In utter ruin,
91. That they attributed
A Son to The Most Gracious”.

With respect to the learned Judge, we are clearly of the opinion that Mr. Taslima's criticisms are unanswerable. No offence is committed under section 129 of the Penal Code where the deliberate intention of the perpetrator of the alleged misconduct was other than wounding the religious feelings of those on the scene. Neither the learned trial magistrate nor the learned Judge appears to have addressed her/his mind to the question of *mens rea* in this case. In the course of her judgment the learned trial magistrate said:

In this case [there is] no dispute that the accused person was at Chamwino preaching Islamic religion. The questions in this case are:-

1. Whether the accused got permit to preach.
2. Whether the accused used abusive words to abuse (sic) another religion”.

Nowhere in the judgment is there evidence which shows that the learned trial magistrate was aware that the prosecution had the onus to prove that the appellant had the deliberate intention to wound the

religious feelings of those within the hearing range. The issues she posed were clearly irrelevant. She made no attempt to consider, among other things, whether, in making the utterance complained against, the appellant did more than exercise his Constitutional right to freedom of religion. The learned Judge, on his part, discussed the validity or otherwise of the conviction only in three sentences, two of which are fairly short, when he said:

I now turn to the case at hand. I respectfully agree with the learned State Attorney that the prosecution's evidence proved the offence against the accused beyond reasonable doubt. The conviction, therefore was justified.

The learned Judge's attention was apparently not drawn to the need for him to be satisfied that the requisite *mens rea* was proved in the case. We have examined the record of the case with great care and have found neither direct nor circumstantial evidence to justify the conclusion or inference that the deliberate intention of the appellant when he uttered the words in question was to wound the religious feelings of those who were to hear him. On the contrary, the evidence clearly demonstrates, in our opinion, that the appellant was, at the material time, on a mission to propagate his religion, Islam. At the time the Regional C.I.D. Officer arrived at the public meeting the appellant was merely repeating what the Qur'an unequivocally states in several Surahs, including Surah 19, which we have already quoted from, and Surah 5, which, again, Mr. Taslima drew our attention to. Verse 75 of that Surah reads:

“75. Christ the son of Mary
Was no more than
A Messenger: many were
The Messenger that passed away
Before him...”

It is neither possible nor desirable to list all situations which may manifest the deliberate intention of wounding religious feelings. That intention may be manifested by the speaker declaring it in so many words, or by the circumstances surrounding the making of the utterance, sound or gesture. If, for example, a non-Christian were to preach in church grounds that Jesus Christ is not the Son of God, or if he were to interrupt a Christian ceremony, function or meeting by making such a declaration, it could be inferred that his deliberate intention in so doing was to wound the religious feelings of those Christians hearing him. In the instant case the place where, and circumstances under which,

the appellant made the utterance, and the nature of the meeting, had, among other things, to be taken into account in determining what the appellant's deliberate intention was.

The provisions of section 129 of the Penal Code were not intended to, and do not, frown upon sober or temperate criticisms of other persons' religions even if those criticisms are made in a strong or powerful language. It should always be remembered that what is regarded as truth in one religion may not be so regarded in another. Even if some sections of society consider the spreading of certain religious messages, in an area where those messages are taken to be unwanted, as being an irresponsible, insensitive or provocative action it would not constitute a violation of section 129 of the Penal Code to spread those messages there if the deliberate intention of the speaker was to propagate his religion or religious views, and not to wound the religious feelings of those hearing him. The enactment of the provision was not intended to license an unreasonable abridgment or restriction of the right to propagate one's religion or religious views. It was primarily intended to safeguard public order. Freedom of religion is not so wide as to authorize the outrage of religious feelings of others, with a deliberate intention.

For the reasons we have given, we agree with Mr. Taslima that in this case the prosecution failed to prove the requisite *mens rea*. Consequently, we find merit in the first ground of appeal. These findings are sufficient to dispose of the appeal, but, bearing in mind the novelty and importance of the case, we deem it useful to deal with the other grounds of appeal, albeit briefly in each case.

We proceed, therefore, to examine the merits or otherwise of the second ground of appeal. It was the contention of Mr. Taslima here that the learned Judge erred in law in not evaluating the evidence laid in the scales at the trial and assigning reasons for agreeing with the findings arrived at by the learned trial magistrate. We have no doubt that this complaint has merit. We have already pointed out, when dealing with the first ground of appeal, that the learned Judge, when he turned to a consideration of the validity or otherwise of the appellant's conviction, merely said that he agreed with the learned State Attorney's submission that the prosecution had proved their case beyond reasonable doubt. He made no attempt to consider how the evidence proved each ingredient of the offence the appellant was convicted of, and he gave no reasons for holding that the learned State Attorney's submission was well-founded. The necessity for courts to give reasons cannot be overemphasized.

It exists for many reasons, including the need for the courts to demonstrate their recognition of the fact that litigants and accused persons are rational beings and have the right to be aggrieved. And as was pointed out by M.K. Mukherjee, J., in *Rupan Deol Bajaj and An. v. Kanwar Pal Singh Gill and An.* [1995] Supp. 4 S.C.R. 237, at p. 258,

Reasons introduce clarity and minimize chances of arbitrariness.

Nowhere in his judgment in the instant case does the learned Judge appear to have noted that not only did the learned trial magistrate frame irrelevant issues but she also made no attempt to discuss those issues. Bearing in mind what we have said, we are driven to the conclusion that the complaint in the second ground of appeal has merit. That conclusion brings us face to face with the third ground of appeal.

This ground of appeal can, we hasten to think, be dealt with very briefly. It was Mr. Taslima's submission that to prove a charge under section 129 of the Penal Code the prosecution must adduce evidence from someone whose religious feelings were wounded by the alleged utterance, sound or gesture, to the effect that his said feelings were wounded. We can find no warrant for thinking that there is merit in this contention. It would be doing great violence to the language of the section to hold that such proof is required. It is enough if it is proved that the accused's deliberate intention was to wound someone's religious feelings. Of course, if a witness testifies that his religious feelings were wounded, and eventually the charge is proved beyond a reasonable doubt, the proof of wounding may be relevant in the assessment of sentence to be imposed on the accused. The offence is complete once the utterance is made. It follows that, in our opinion, Mr. Taslima's argument is misconceived in law.

We turn now to the fourth ground of appeal. As will be recalled, the criticism here is that the learned Judge denied the appellant the opportunity to be heard when the revisional proceeding was conducted. It was contended by Prof. Safari, on behalf of the appellant, that the omission to give him that opportunity violated the provisions of Article 13(6) (a) of the Constitution and section 373(2) of the Criminal Procedure Act, 1985. The Constitutional provision reads as follows:

(6) To ensure equality before the law, the State authority shall make procedures which are appropriate or which take into account the following principles:

- (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;
- (b) ...
- (c) ...
- (d) ...
- (e) ...

In order to grasp fully what is prohibited by subsection (2) of section 373 of the Act, it is necessary, we think, to quote the preceding subsection of the section also. This is how the two subsections read:

373. –(1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under sub-section (1) of section 219 of this Act shall be deemed not to be an order of acquittal.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this sub-section”.

In the instant case it is not in dispute that the learned Judge conducted the revisional proceeding in the absence of the appellant, who was given no opportunity to be heard in his own defence. There can be no doubt whatsoever that the omission to provide that opportunity to the appellant was a very serious error. It offended the provisions of sub-section (2) of section 373 of the Act we have quoted a short while ago. The decision of the learned Judge affirming the conviction did in the circumstances prejudice the appellant. Very rightly, Mr. Mlipano, the learned State Attorney, conceded before us that the learned Judge’s error is fatal to his decision. The importance of the right to be heard has been commented upon by many eminent judges over the centuries. Nearly three centuries ago, in *R v. University of Cambridge*, 1723, 1 Stra. 557, cited

with approval by Megarry, J., in *John v. Rees and Others*, [1969] 2 All E.R. 274, Vortescue, J., used the following celebrated words to emphasize the importance:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.

We are satisfied, for the reasons we have given, that there is merit in the complaint in the fourth ground of appeal.

Finally, we proceed to deal with the fifth ground of appeal. It was submitted on behalf of the appellant that no judgment was in law delivered by the learned magistrate in this case. It is common ground that although she framed two issues in the case, she dealt with only one of them, and the one which was considered was dealt with perfunctorily. Another criticism levelled at the learned trial magistrate's judgment is that it scarcely contained any reasons justifying the final conclusions arrived at on the case. We have already discussed the importance of giving reasons in decision making. We will not revert to that point. We will confine ourselves at this stage to determining whether the learned trial magistrate fully complied with the requirements of section 312(1) of the Act, which reads:

312. – (1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open court”.

While we are hesitant to travel the whole distance with counsel for the appellant and say that the judgment delivered by the trial court in this case is no judgment in law, we have no hesitation in holding, as we do, that the said judgment did not sufficiently meet the requirements of the subsection we have just quoted. We wish to draw attention to what this Court said in *Lutter Symphorian Nelson v. (1) The Hon. Attorney General. (2) Ibrahim Said Msabaha*, Civil Appeal No. 24 of 1999 (unreported) on what a judgment should contain:

“... A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In *Amirali Ismail v. Regina*, 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said:

‘A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how’”.

The failure to comply with the relevant statutory provisions as to the preparation of a judgment will be fatal to a conviction where there is insufficient material on the record to enable the appeal court to consider the appeal on its merits: see *Wily John v. R.*, (1956) 23 E.A.C.A. 509. In the instant case the learned Judge erred, in our opinion, in not holding that the learned trial magistrate’s judgment fell short of meeting the requirements of section 312(1) of the Act.

We have clearly demonstrated, we think, that the learned Judge should not have affirmed the appellant’s conviction and that, therefore, this appeal must succeed. We desire, before we make resultant orders, to make two observations.

The first one concerns revisional powers. No one can doubt the usefulness of these powers, but they should be exercised in appropriate cases. Save in cases where justice requires an obviously improper conviction, or illegal sentence to be at once quashed or rectified, revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged: see *(T) Lobozi s/o Katabaro v. R.*, (1956) 23 E.A.C.A. 583. In the instant case the revisional proceeding was conducted before the expiry of the period within which an appeal against the district court’s decision could be lodged. On August 6, 2001, the appellant had, through the Officer-in-Charge of Morogoro Prison, given a notice of appeal. No inquiry appears to have been made as to whether an appeal was likely to be lodged. This should have been done.

The second matter we desire to comment upon is religious intolerance. Religions can, and should, be a solid foundation of peace. In countries where they have not been given a chance to play that vital role, they have launched many wars, caused endless streams of blood and rolling

of thousands of heads. Religious intolerance is a vice which must not be permitted to find a place in the hearts of our people. It must be repressed by every lawful method. When a person embracing a religious faith or view is told by another person, whose religious faith or view is different, something concerning religion which he considers to be untrue, he should be able to answer him by echoing the wise words of Voltaire, the 18th century French philosopher:

I disagree profoundly with every word that you say but I shall defend unto the death your right to say it.

In the holy books of almost all major religions in the world one finds passages directly or indirectly exhorting people to religious tolerance. In the Qur'an, for example, there are the following verses, in Surah 109:

2. "Say (O Muhamad to these Mushrikun and Kafirun): 'O Al-Kafirun (disbelievers in Allah, in His Oneness, in His Angels, in His Books, in His Messengers, in the Day of Resurrection, and in Al-Qadar)!
3. I worship not that which you worship,
4. Nor will you worship that which I worship.
5. And I shall not worship that which you are worshipping.
6. Nor will you worship that which I worship.
7. To you be your religion, and to me my religion".

The Constitution of the United Republic of Tanzania and other relevant laws oblige the people of this country to live together with mutual respect and tolerance. It is one of the principal obligations of good citizenship.

For the reasons we have given, we allow the appeal, quash the conviction and set aside the sentence imposed thereon.

DATED at DARES SALAAM this 14th day of March, 2003.

B.A. Samatta
CHIEF JUSTICE

J.A.Mroso
JUSTICE OF APPEAL

E.N. Munuo
JUSTICE F APPEAL

I certify that this is a true copy of the original.

Justice Samatta in His Own Words

Extra-Judicial Statements

Introduction

Aside from the eloquent judgments and rulings, Justice Samatta also made a number of extra-judicial statements in the course of delivering speeches on various topical issues in the field of law. He did this on many many occasions. This part comprises of select extra-judicial statements and speeches on contemporary issues that would provide some guidance when laying emphasis on the necessity of complying with the fundamental doctrine of the rule of law.

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On Environmental Justice

Speech made by Chief Justice B.A. Samatta, at the Conference of
Chief Justices of Arab States on 29th May, 2004, in Cairo, Egypt

I wish, at the outset, to express my deep gratitude to his Lordship, the Chief Justice of Egypt, the Supreme Constitutional Court of this country and the United Nations Environment Programme for extending an invitation to me to attend, as an observer, this conference of the Chief Justices of Arab countries.

I deem it a great honour and privilege for me to be here and, in particular, to address this very distinguished audience of learned men and women. I look forward to learning from you during the next three days how, among other things, judiciaries in this region deal or plan to deal with legal issues arising from environmental degradation and ecological imbalance.

My Lords and Distinguished Guests, about a hundred years ago, a renowned Russian dramatist and short story writer, Anton Chekhov, made what I think was an exceptionally great statement on the need to protect life on our planet. He said:

Human beings have been endowed with reason and a creative power so that they can add to what they have been given. But until now they have been not creative, but destructive. Forests are disappearing, rivers are drying up, wildlife is becoming extinct, the climate is being ruined and with every passing day the earth is becoming poorer and uglier.

Mr. Chekhov must have turned in his grave when, in his statement to mark last years' World Environment Day, Mr. Koffi Annan, the United Nations Secretary General, said the following on the global problem of desertification and drought:

All parts of the world are affected. Last year's drought in Australia was the worst in more than a century during which millions of tons of productive top soil blew away in dust storms, crippling crop production and exports. Every year in India, dry spells of deforestation turn 2.5 million hectares into wasteland, while elsewhere in Asia, sandstorms are becoming a growing threat to the economy and the environment. Some 70 percent of all land in MEXICO is vulnerable to desertification, prompting 700,000 to 900,000 Mexicans to leave their homes every year in search of a better living as migrant workers in the United States. But nowhere is the problem of desertification more acute than in the sub-Saharan Africa, where the number of environmental refugees is expected to rise to 25 millions in the next 20 years.

According to scientists, last year's temperatures were the third highest since 1861. It is also reported that there were 21,000 extra fatalities in Europe's heat wave last year that is attributed to climate change. According to other experts, present global atmospheric carbon dioxide concentration of 379 parts per million is the highest for at least 420,000 years. A research carried out at the York University in the United Kingdom has revealed that when temperatures exceed a threshold, trees and other plants emit chemicals that encourage toxic ozone production. In other words, heat waves can make trees and other plants cause pollution. Though flawed by scientists on several points, the recently made blockbuster climate disaster movie, *The Day After Tomorrow*, which portrays the switching off of the Gulf Stream and the Northern Hemisphere's subsequent plunge into a new Ice Age, is a dramatic contribution of the film industry towards raising peoples' awareness of the threat to the existence of the human race and other creatures posed by environmental degradation and ecological imbalance taking place on our planet.

There can be no rational debate, in my opinion, over the fact that the very grim picture of the environmental situation I have referred to calls for the taking of drastic measures, both legal and non-legal, if a monumental human tragedy is to be avoided. John F. Kennedy once remarked, "**mankind must put an end to war or war will put an end to mankind**". It may also be said, I think, that mankind must put an end to environmental degradation or environmental degradation will put an end to mankind.

Many professional men and women must surely bear part of the blame for the heart-breaking situations which Mr. Chekhov and Mr. Koffi Annan described. Are judges among those professionals? Have judges

been guilty of inaction or indifference in the field of environmental protection? Have they permitted environmental law in their respective jurisdictions to remain sterile? Undoubtedly, these are very important questions, but they can arise only if we agree that judges, like other public officials, have a role to play in the protection of environment. I entertain no doubt that both the lawyer and the layman would readily agree that it is the duty of every public official, including judges, to promote sustainable development. That kind of development cannot be guaranteed unless environmental law is enforced. The importance of protecting the environment for sustainable development has been alluded to by many eminent leaders. Dr. Klaus Toepfer, the Executive Director of UNEP, puts his views on the matter in these pregnant words:

It is hard to overstate the importance of the environment to sustainable development. It is the bedrock on which our survival lies. Any global programme of development created without taking the environment into account will truly be a house built on sand.

Fortunately this view is shared by many eminent judges. Members of the Judiciary across the globe, who assembled at the **Global Judges Symposium on Sustainable Development and the Role of Law**, in Johannesburg, South Africa, from 18th – 20th August, 2002, a symposium sponsored by the UNEP, affirmed, among other things, that “the judicial process is a vital mechanism for the implementation, progressive development and enforcement of environmental law, and that the Judiciary as well as those contributing to the judicial process, at the national, regional and global levels are crucial partners for promoting compliance with, and the implementation and enforcement of international and national environmental law”. It must always be remembered that implementation of environmental laws plays a crucial role in poverty alleviation, a process which in turn enhances peace in a society. As is well known, in developing countries underdevelopment remains one of the primary causes of environmental problems.

Some jurisdictions have risen admirably to the challenges posed by environmental degradation. India, Pakistan and Philippines rank very high on the list of those jurisdictions. The Supreme Court of India has on several occasions interpreted Article 21 of the Constitution of that country, which guarantees the right to life, as also proclaiming the right to clean and healthy environment. In *Kumar v. State of Bihar* AIR 1991 SC 420 the Court observed:

The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right to enjoyment of pollution – free

water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution.

In 1994 the Supreme Court of Pakistan delivered, in *Shehla Ziaa and Others v. WAPAA* (PLD 1994 SC 693), what is undoubtedly a landmark judgment. In that case the Court held, among other things, that the right to life, guaranteed by Article 9 of the Constitution of Pakistan, includes the right to a healthy environment. Thus, environmental rights were accorded the highest status in Pakistan law – a Constitutional status. In *Juan Antonio Oposa v. The Honourable S. Factoram and Another*,¹ SA ELR 113, a fourteen – judge bench of the Supreme Court of Philippines was called upon to determine, among other things, whether the petitioners, a group of minors, could bring an action on behalf of generations yet unborn. Essentially, the petitioners' case was that Philippines natural forest was rapidly being depleted at such rate that by the end of the decade, if not sooner, the country would be bereft of forest resources. They sought an order against the respondents canceling all existing timber licence agreements. The Court held that the petitioners had the right to sue on behalf of generations yet unborn. Dealing specifically with the argument that the petitioners had a Constitutional right to a "balanced and healthful ecology" and were entitled to the protection of the State in its capacity as *parens pariae*, the Court said:

...[the basic rights to a balanced and healthful ecology] need not be even written in the Constitution for they are assumed to exist from the inception of humankind. Now that they were explicitly mentioned in the fundamental charter, it was because of the well founded fear of its framers that unless the rights to a balanced and healthful ecology and to health were mandated as State policies by the Constitution itself, thereby highlighting their continued importance and imposing upon the State a solemn obligation to preserve the first and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.

The decision of the Supreme Court of Philippines in that case is likely to generate great interest among judges and lawyers all over the world for a very long time to come.

In Tanzania, judges have been following with great interest judicial activism taking place in a number of jurisdictions. In 1988 some residents of a suburb of Dar es Salaam summoned the law to their aid. They sought from the High Court of Tanzania an injunction restraining

the City Council from operating in their locality a garbage dump that created severe air pollution. The Court granted the application; it ordered the Council to construct an alternative site, far from residential areas, for dumping garbage collected from the city. It nevertheless stayed execution of the decision for a total period of two years. Asserting that the construction of a new dump would require more time, almost at the end of that period the Council filed a third application before the Court seeking another extension of the stay of execution. The judge who heard this application found no difficulty in rejecting it. In the course of his ruling, he said:

I will say at once that I have never heard it anywhere for a public authority, or even an individual, to go to court and confidently seek for permission to pollute the environment and endanger people's lives regardless of their number. Such wonders appear to be peculiarly Tanzanian but I regret to say that it is not given to any Court to grant such a prayer. Article 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the Court in this infringement.

It is important to remember, I respectfully think, that the thirteenth Principle of **The Rio Declaration on Environment and Development**, adopted on 14th June, 1992, at the United Nations Conference on Environment and Development, held at Rio de Janeiro, calls upon States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage. National courts have a crucial role to play in this area. They will perform that role more effectively if they heed the wisdom of Professor Gamini Lakshman Peiris, one of the most outstanding Sri Lankan legal scholars, who, at pages 273 – 274 of his book, *TOWARDS EQUITY*, says:

... the judicial function entails a high degree of creativity. A judge is not there simply to discover a body of rules and then to apply those rules mechanically to situations that arise in litigation where he is called upon to adjudicate. There is a creative role for the judge to discharge, in the sense that he must evaluate for himself the rationale of the rules that he is called upon to apply. It is only then that the law becomes a living mechanism, virile, vibrant, productive and of use to the community. Otherwise it becomes arid and sterile.

This approach is of particular relevance to the field of environmental law where reform of archaic laws is of the utmost importance.

Involvement in legal routine and technicality is likely to disable judges from appreciating adequately what judicial measures public interests are calling for. Subject to their Constitutional mandate, judges should strive to be alert, assertive and activist when dealing with human rights cases, including cases in which the applicable law is environmental law. They must reject outmoded doctrines and formulate new principles to replace them. They should adopt a humanistic rather than a purely legalistic approach. They should be bold enough to say, as the Supreme Court of India said in the *Ganga Pollution* case:

We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.

Judges have a crucial role of balancing development and protection of environment. The interests of the powerful must be reconciled with those of the voiceless poor. It is a function which must be discharged if the survival of humankind is to be ensured,

As we all know, in the last one hundred years there have been dazzling achievements of science, but, as is unequivocally stated in the 18th Principle of the **Stockholm Declaration**, science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks the solution of environmental problems and for the common good of mankind. Judges can prevent science or technology being applied to the destruction or damage of environment.

Finally, My Lord Chairman, I wish to share with the Distinguished Delegates my views on steps which can be taken to improve the capacity of judges and other stakeholders, such as enforcement officers, investigators and prosecutors, in the promotion of compliance with and enforcement of environmental law. In my view, the following, in summary, are some of those steps:

1. Sensitization of judges and other stakeholders on issues appertaining to environment and ecology.
2. Translating judicial activity into activism and thus ensuring that the law has a practical content.
3. Evolving an indigenous human rights jurisprudence that is sensitive to social economic conditions and markets dominated by multinational corporations.
4. Making environmental justice accessible to the poor, too. *Locus standi* should be broadened so that persons other than victims can take environmental disputes to courts.

5. The law putting in place a system of reasonable and effective compensation for victims of environmental disasters.
6. Ensuring availability of literature on environment and environmental law.
7. Translation of literature on environmental law into a local language or languages used by stakeholders. The translation of the Judges Handbook on Environmental Law, prepared by UNEP, would be very useful.
8. Establishing special courses on environmental law at relevant institutions of higher learning.
9. Training judicial officers and other stakeholders. It is quite possible that when many of them received their legal education courses on environmental law were not available at their institutions. In any case, as was rightly remarked by Mr. Justice Uwais, Chief Justice of Nigeria, at a conference similar to this one, held in Nairobi, Kenya: *"Law is a living subject, it grows daily and Judges must continue to update their knowledge to meet the changes that take place..."*
10. Co-operation between judiciaries. Here I must pay tribute to UNEP for having sponsored international as well as regional conferences for judicial officers. These conferences have proved to be very useful.
11. Consideration be given to the possibility of introducing non-traditional penalties for contravention of environmental law. Penalties like rendering community service, for example, cleaning a river; carrying out a specific implementation of an environmental plan; compensation; tree planting; corrective advertisement and apology; and, in the case of corporations, ordering the villains to include in their annual reports convictions entered against, and penalties imposed on, them, have, I understand, been introduced in Australia.

My Lord Chairman, My Lords, Ladies and Gentlemen, I have, I hope, sufficiently demonstrated that the vulnerability of our planet has reached such a depressing degree that there is no greater service judges can render to mankind than playing their role in the protection of the environment and thereby assuring the people of their enjoyment of the freedom from fear and danger. Those who exercise judicial power must always remember, when determining environmental disputes, the wisdom underlying the old saying:

Once the last tree is cut and the last river poisoned, you will find you cannot eat your money.

I thank you all for your kind attention.

On Tanzania's Constitutional Order

Speech Delivered by Chief Justice Barnabas A. Samatta at
the ceremony to Launch the Book, '*Constitutional and Legal
System of Tanzania: A Civics Sourcebook*'³⁶ on 25th May, 2005,
in Dar es Salaam

I would like to begin by thanking the Managing Director of the **Mkuki na Nyota Publishers**, the publishers of the Civics Sourcebook that I will later this evening have the greatest pleasure of launching, and Professor Issa Shivji, the book's editor, for inviting me to launch the book. I have also been asked by the two eminent hosts to share with this distinguished audience, before launching the book, some thoughts on one or two aspects covered by the book. I feel greatly privileged and honoured to receive that invitation. I propose to speak on few aspects of our country's Constitutional order.

On 21st November, 2000, I had a special privilege and honour to address the Honourable Members of Parliament at their inaugural seminar, held at Dodoma. I wish to revisit here a few of the issues I raised in my paper at that Seminar. Some of the senior politicians in this country have been reported by newspapers as expressing the view that the Constitution of the United Republic of Tanzania is a contract between the rulers and the ruled as to how our country should be governed. With greatest respect to these politicians, I have no doubt that the proposition is a misconception of the status of a national Constitution. That instrument cannot bear such status, for the simple reason that offices of rulers are creations of the instrument. In my opinion, a national Constitution, save where it has been imposed by dictators or usurpers of people's power, is a consensus reached by the people as to how their country

36. I.G. Shivji, H.I. Majamba, C.M. Peter and R.V. Makaramba, *Mkuki na Nyota Publishers*, Dar-es-Salaam, [November, 2004]

should be governed. To associate our Constitution with the status of a contract between the rulers and the people is to deny the latter of their sovereignty. The instrument is a law for rulers and the ruled.

I wish now to turn to the question of the limits, if any, on the powers of our Parliament. According to the English common law doctrine of Parliamentary sovereignty or supremacy, the legislative powers of the British Parliament are almost unlimited. A long time ago, one British legal scholar expressed the view that the only legislative power that legislature lacked is the power to enact a law changing a man into woman and vice versa. According to the scholar, the legislature could competently enact a law condemning all red-haired men to death. It is almost certain that these propositions of law are incorrect today. The powers of the British Parliament must now be considered in the light of the strong wind of change blowing over Western Europe as a result of some decisions on European Community laws, made by the European Commission or the Court of Human Rights on issues relating to human rights. It is highly arguable that, by the United Kingdom becoming a party to treaties guaranteeing human rights, limitations have been placed on legislative powers of its Parliament. Be that as it may, the fact that the Constitution of Tanzania, unlike that of the United Kingdom, is a written one makes the doctrine of Parliamentary supremacy inapplicable to our Parliament. It is submitted that, since our Parliament is a constituted body, as opposed to a constituent body, one is compelled to examine the Constitutional instrument creating it to discover whether the legislature's powers are unlimited. That legislative organ cannot have more powers than those bestowed upon it by the Constitution. Addressing the Calcutta Rotary Club, about forty years ago, an eminent Indian judge discussed the concept of Parliamentary supremacy. He said, among other things:

In a nation governed by a written political Constitution it is vain to look for supremacy in Parliament. The supremacy is of the Constitution. The Supremacy is an archaic political philosophy born ... as the revolt of a people against a tyrant King. While its continued necessity may be imaginable in a country still governed by a Monarch against the Monarch's possible misbehaviour, that doctrine is wholly out of place in a people's Republic where the people themselves as sovereigns have given them a Constitution. The Constitution, therefore, is the supreme verdict of the people and all other organs must subserve that Constitution. Those who think of Parliamentary supremacy in a written political Constitution are, therefore, thinking in terms of an outmoded political philosophy. If you want Parliamentary supremacy you will have to scrap the Constitution.

The powers of our Parliament of “altering” the Constitution of the United Republic of Tanzania, which are conferred by Article 98 of the instrument, would, *prima facie*, appear to be unlimited. But are they? The Article reads:

98. – (1) Parliament may enact legislation for altering any provision of this Constitution in accordance with the following principles:

- (a) (a) A Bill for an Act to alter any provisions of this Constitution (other than those relating to paragraph (b) of this sub article) or any provisions of any law specified in List One of the Second Schedule to this Constitution shall be supported by the votes of not less than two-thirds of all the Members of Parliament;
- (b) (b) A Bill for an Act to alter any provisions of this Constitution or any provisions of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all Members of Parliament from Mainland Tanzania and not less than two thirds of all Members of Parliament from Tanzania Zanzibar.
- (2) For the purposes of construing the provisions of sub article (1), alteration of provisions of this Constitution or the provisions of a law shall be understood to include modification, or correction of those provisions or repeal and replacement of those provisions or the re-enactment or modification of the application of the provisions”.

I have not had the benefit of submissions by counsel, but it seems to me that the answer to the question I posed a short while ago must be in the negative. I respectfully invite those who hold different views on this matter to ask themselves the following questions:

- (1) Can our Parliament, without referring the question to a direct vote of the electorate, enact a law abolishing the republican system of government currently in place, and replace it with a monarchy? Is it competent to subject Tanzanians, without their consent, formally and unequivocally given, to a rule of a King or Queen? There can be no doubt, of course, that there would be no shortage of applicants wishing

to have the crown placed on their heads if that system of government were to be adopted.

(2) Can Parliament repeal Article 14 of the Constitution and abolish the right to life?

(3) Can Parliament enact a law repealing Article 15 of the Constitution and extirpate the fundamental right to personal freedom?

(4) Can Parliament abolish the guarantee of the right to freedom of religion? Or, can it enact a constitutional amendment compelling Christians and Muslims to merge their religions?

(5) Can the legislature, without a referendum being held on the matter, amend Article 1 of the Constitution, which declares the United Republic of Tanzania to be a sovereign State, and declare the country to be a non-sovereign State and part of a neighbouring country?

I submit that the answers to all these questions must be in the negative. All the areas in the Constitution covered by those questions constitute **basic features** of the instrument, the substantial alteration or amendments of which require the direct consent of the people. To answer the five questions I have posed and others of similar nature in the affirmative is to place Parliament above the people, in whom sovereignty resides. Since Parliament is a creature of the Constitution, it cannot be above that instrument. The legislative body has only those powers which the people, through the Constitution, has conferred upon it. The same may be said of the Executive and the Judiciary. Any proposition to the contrary would place the country under the dictatorship of those organs. The three organs of State are required to discharge their functions within the four corners of the Constitutional provisions.

I turn now to an issue arising from the separation of powers of the three principal pillars of the State, the executive, Parliament and judiciary. As many of us present here know, the High Court of Tanzania is empowered by the Constitution to determine the Constitutional validity of enactments by Parliament and subordinate legislative organs. Apparently, some fears exist in some quarters in the country that the discharge of that function may lead to judiciary tyranny. To allay these fears, it must be pointed out that our judges recognize that the Constitution has not set up a government of judges in this country. When exercising the power of judicial Constitutional review, they do not operate in the dark; they are guided by well-established principles of Constitutional interpretation. The following are some of those principles:

(1) Courts are not concerned with the legislative wisdom of Parliament. They are concerned only with its legislative competence.

(2) A purely or uniquely political question falls outside the courts' jurisdiction. It is true, of course, that such question may eventually become a legal one, but until it so becomes the courts are under the bounden duty to refuse to entertain it.

(3) The law recognizes a presumption in favour of Constitutionality of statute. The courts will, therefore, not strike down a legislation on the ground that it is unconstitutional unless the repugnancy to the Constitution is clear and beyond doubt.

(4) While Parliament cannot directly override a decision of a court of law declaring a statute unconstitutional and pronounce it to have been valid, it can make a fresh law, free from the unconstitutionality.

(5) The power to act as a Constitutional invigilator, which is conferred upon the High Court, has to be exercised with a due sense of responsibility. The Constitution must be made a workable instrument.

(6) It is a corrupt use of the power of statutory interpretation for a judge to annul or alter a law on the ground that he or she does not like it. Happily, professional traditions and their technical training, among other things, enable judges to overcome that human weakness.

(7) Courts do accept that civilization owes quite as much to those who limit freedom as to those who expand it.

(8) Courts will not embark upon a question of Constitutionality of legislation if it is possible to dispose of the case and determine the rights and obligations of the parties before it on other grounds.

(9) Courts have a duty and responsibility to interpret the Constitution and other laws to further Fundamental Objectives and Directive Principles of State Policy laid down in Part II of Chapter One of the Constitution. Their interpretation of the provisions of that instrument should be geared at, among other things, facilitating the creation by the State of conditions in which basic rights and freedoms can be enjoyed by all. In the case of *Julius Ishengoma Francis Ndyanabo vs. Attorney General* our Court of Appeal gave the following guidance, among others, on the interpretation of the Constitution:

... the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble, Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in

tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law.

There should be no friction between the principal pillars of State if each pillar understands the perimeters of its functions and powers and ensures that it does not step on the other pillars' toes. Every organ of the State and every public leader must heed the advice which Aristotle gave about eight hundred years before the birth of Prophet Muhamad:

To live by the rule of the Constitution ought not to be regarded as slavery, but as salvation.

Finally, please permit me, Distinguished Guests, to say a word or two on Article 113A of the Constitution. This provision reads:

113A. It is hereby prohibited for a Justice of the Court of Appeal, a Judge of the High Court or a magistrate of any grade to join any political party, save only that he shall have the right to vote which is specified in Article 5 of this Constitution.

There can be no rational debate over the fact that this provision makes a serious encroachment upon judicial officers' freedom of association, guaranteed by Article 20 of the Constitution. Some of you present here may not be aware that this provision was incorporated into the Constitution at the request of the Judiciary, following a resolution passed at a meeting of the organ's Master Workers Council. Members of the Council recognized that the rule of law could not prevail in the country, and if it prevailed, it could not be seen to do so, if judicial officers were not prevented from joining political parties. Although Article 113A has not been a subject-matter of interpretation by a court of law, it is not unlikely that the spirit underlying it would be held to impose prohibitions not only against becoming members of political parties, but also against funding, advising political parties and taking part in their activities. Judges and magistrates have, as far as political parties are concerned, been deprived of one of the fundamental freedoms, the freedom of association, but since democracy and its heart and core, rule of law, are beneficiaries of that abridgement, the Constitutional provision is plainly defensible. As far I know, no judicial officer has complained against the abridgement.

Distinguished Hosts, Distinguished Contributors, Distinguished Guests, Ladies and Gentlemen, my right to trespass upon your attention this evening is very limited. I wish to conclude my remarks by expressing the hope that what I have endeavoured to say, or part of it, has rekindled your interest in the majesty of the Constitution of the United Republic of Tanzania, in particular, and the law, in general.

No One is Above the Law

Farewell speech delivered by Mr. Justice Barnabas Albert Samatta, Chief Justice of Tanzania, on the occasion of his retirement, on 19th July, 2007, at the Court of Appeal grounds in Dar Es Salaam

Every journey, regardless of its character, must have an end. As many of you assembled here know, I began my professional journey forty-one years ago. Today that journey will come to an end. At the outset, I wish to express my profound gratitude to his Lordship the Chairman, the Honourable the Attorney General and the Distinguished President of the Tanganyika Law Society for the very kind things they have said about me. I am humbled by those remarks. I wish to thank the Honourable Prime Minister, the Honourable Minister for Justice and Constitutional Affairs and the Honourable Deputy Minister for Justice and Constitutional Affairs for gracing this occasion. The honour you have paid me by your presence here this morning will be a source of great strength for me as I start my retirement life. During the years I worked as a State Attorney and, later, Director of Public Prosecutions, and during the thirty one years I have worked as a Judge, in Zimbabwe and here at home, judges, registrars, directors, magistrates, State Attorneys, advocates and many lay men and women, including members of the supporting staff of courts, extended to me unforgettable co-operation. If my life at the public bar and the bench has been a happy one – and it was – it is to their co-operation that I owe most of it. In the course of discharging my functions, I learnt a lot from them, and I hope they learnt something, however little, from me. To all of them I wish to say **THANK YOU**. Naturally, my special thanks go to my learned brothers and sisters in the Court of Appeal and to the highly dedicated officers and members of the supporting staff of that Court, past and present,

for their unwavering support and exemplary commitment to duty. I feel I was very privileged to have worked with such a committed and distinguished team. I wish them to know that I greatly enjoyed working with them.

My Lords and Ladies, the Judiciary must continue to play its role of ensuring that democracy in our country grows and our people enjoy the personal freedoms guaranteed to them by the Constitution of the country. This least harmful organ of the State must not weaken its resolve to protect the weak against the oppression or tyranny of the strong and the ruthless. Those exercising State power must never be left in doubt that transgression of the people's basic rights will be met by the fury of the law. Judicial officers must always remember that, to use the words of the drafters of the Preamble to the **Bangalore Principles of Judicial Conduct**, *"the implementation of all the other rights ultimately depends upon the proper administration of justice"*. Judges and magistrates in this country must continue, even at the risk of being labelled as ultra conservatives, to defend the independence of the Judiciary. As everyone trained in law knows, there can be no personal freedoms if courts are not independent. But that independence will survive only if it is used as a tool for upholding justice. If it is wielded for purposes other than that it will wither and its enemies will celebrate. Corruption is one of the greatest enemies of the independence of the judiciary. Although the Transparency International recently rated our Judiciary the least corrupt in East Africa, the war against corruption in the Judiciary should continue. The road to justice is the only road a judicial officer should travel on. He or she must not even contemplate traveling on the road to political convenience or compromise of principles.

My Lords and Ladies, I recognize that I need not remind you that it is of the utmost importance that the Judiciary fulfils its role of upholding Constitutionalism and the rule of law in our country. Judges should always remember, while discharging their function of interpreting the country's Constitution, that they are the chief guardians of the supreme law and fundamental democratic values embodied in it. Those values include rule of law, equality before the law and multiparty system. Unfortunately, some political leaders do not seem to recognize that, having given way to Constitutional supremacy, party or Parliamentary supremacy is a doctrine which no longer forms part of the law of this country. Our superior courts must not hesitate to demonstrate their boldness while playing their role as guardians of the new Constitutional order and our country's basic democratic values. They must transform

our Constitution into a living law for our people. As the Chief Justice of the countries in the Southern and East African regions declared at the end of their conference, held at Maseru, Lesotho, in April this year, a country's Constitution "*is not simply a declaratory document but is normative, and must be applied all the time, in action as in words.*" To a very large degree the future of our country and the enjoyment of fundamental rights by our people will continue to depend upon how our superior courts rise up to the challenge facing them in this key field of the law. Anyone attempting to throw the rule of law to the winds must face the consequences authorized by law. Any abuse of democracy must be admonished. Those who govern and those who are governed must obey the law of the land. My Lords and Ladies, I leave the Judiciary very confident that in your able hands the rights of our peoples will continue to be adequately protected. Those who purport to regard themselves as the law by, among other things, disobeying or ignoring decisions or orders made by courts should be severely dealt with. The message that no one in this country is above the law must be conveyed as loudly and clearly as possible.

My Lords and Ladies, throughout my career on the bench I have never doubted that it is a very important duty of a judge to strive to align the law to justice. While it would be wrong for a judge to ignore universal values and precedents from other jurisdictions, it is his duty to apply his talents in the creation of a national jurisprudence which our people can be proud of. Our people will give more respect to courts' decisions if those decisions take into account contemporary cultural values and social needs. The power to modify the common law to suit local circumstances which the superior courts in this country enjoy, for example, can be used by judges to make law that would command respect from the people. Of course, that power must be used only when the interests of justice clearly call for that step being taken. I respectfully suggest that in determining whether a particular common law rule should be modified the following questions, among others, should be considered:

- (1) Was the rule plainly wrong at the time of making?
- (2) Is it plainly wrong in the light of modern conditions?
- (3) Is the rule embodying human rights or is it contrary to human rights provisions?
- (4) Does it no longer suit the needs of our society?

My Lords and Ladies, as everyone trained in law knows, independence of the courts is an essential element of the rule of law. Unfortunately, we have had some magistrates, happily a few, whose understanding of the concept is plainly erroneous. As Your Lordships and Ladyships are aware, judicial independence does not imply a lack of accountability. One of the surest ways of protecting that independence is judicial accountability. Our Judiciary must remain accountable to the people in the exercise of its power. Since it neither wields a sword nor possesses a pulse the best safeguard of its independence must be public opinion. For this reason if for no other, educating members of the public on the judicial system becomes imperative.

My Lords and Ladies, please permit me now to pose a question: how can justice be done to those who, because of their poverty or otherwise, are unable to access it? Undoubtedly, there is no simple answer to this very important question. In my view, courts can mitigate the hardship of non-accessibility to justice by, among other things, giving judgments and rulings in which general principles relating to justice and good governance are laid down in a language which persons not trained in law would be able to understand. Incidentally, the use of simple language would also constitute an effective method of demystifying the law. Our people must be discouraged from treating the law as something largely relevant to lawyers and court trials as a lawyers' game.

My Lords and Ladies, the Honourable Prime Minister, the Honourable Minister, the Honourable Deputy Minister, the Honourable the Attorney General, the Distinguished President of the Tanganyika Law Society, Ladies and Gentlemen, one renowned writer is on record to have expressed the view that life begins after retirement. In my view it is difficult to accept that assertion. The truth seems to be that retirement is a road to reach a different destination. I will certainly miss my life as a lawyer and a judge. Fighting against injustice and oppression is a mission that I have thoroughly enjoyed during my professional journey. I am, however, very hopeful that the Almighty God will enable me to enjoy my active retirement, too. Leonard da Vinci, the famous Italian painter and sculptor said, about five hundred years ago, that: *just as iron rusts from disuse, even so does inaction spoil the intellect*. I will constantly remind myself of these very wise words during my retirement life. I wish everyone in the legal sector greater successes in future. Let everyone in our society give justice a chance to prevail.

I thank all of you for your very kind attention.

Judicial Protection of Democratic Values: The Judgment of the Court of Appeal on Independent Candidates

A Public Lecture delivered by Chief Justice (rtd) Barnabas Albert
Samatta at Ruaha University College, Iringa, on November 25, 2010

17th June, 2010, will always occupy a special place in the history of administration of justice in this country. As all of you assembled in this Hall well know, on that date a seven- Judge Full Bench of the Court of Appeal (Ramadhani, C.J., Munuo, Msoffe, Kimaro, Mbarouk, Luanda and Mjasiri JJA) delivered its judgment in what is, beyond rational controversy, the most important constitutional case ever to have been brought before a court of law in this country. Having given serious consideration to the possible grave consequences of that judgment on human rights, democracy and rule of law in our country, I have decided, not without some hesitation, to share with you my views on the said judgment.

I wish to thank the Associate Dean of the Faculty of Law for inviting me to address this august gathering. I consider that invitation a great honour and privilege. My topic this afternoon is JUDICIAL PROTECTION OF DEMOCRATIC VALUES: THE JUDMENT OF THE COURT OF APPEAL ON INDEPENDENT CANDIDATES.

Some of you may not be sufficiently familiar with the background to the Court's decision. I will give an outline of it. In 1993, one Rev. Christopher Mtikila filed a petition before the High Court of Tanzania praying for, among other things, a declaration that the amendments to articles 39 and 67 of the Constitution of the United Republic of Tanzania

were unconstitutional. The prayer was based upon the contention that, contrary to the provisions of Article 21 of the Constitution, the said amendments were invalid because they purported to destroy a citizen's fundamental right to take part in presidential, parliamentary or local council election as an independent candidate. The Petition was heard by the late Mr Justice Lugakingira. About a week before the learned Judge delivered his landmark judgment - on October 16, 1994, to be more precise - the Government tabled a Bill before the National Assembly seeking to deny the existence in law of the fundamental right which Rev. Mtikila had asked the High Court to recognize and give effect to. On October 24, 1994, Mr. Justice Lugakingira delivered the much-awaited judgment. He granted the Petition, holding, among other things, that:

1. Fundamental rights are not gifts from the State but they inhere in a person by virtue of birth and they are prior to the State and the law; the enactment of those rights in the Constitution is mere evidence of their recognition and the intention that they should be enforced in a court of law, and an intention that those rights should not be arbitrarily restricted by the State.
2. Parliament is given very wide powers to amend constitutional provisions, including those providing for basic rights, but those powers of Parliament can only be exercised subject to the limits imposed by articles 30(2) and 31 of the Constitution; what is beyond the powers of the Parliament to amend is only the ethic of human rights and not the letter by which those rights are expressed.
3. Article 21(1) of the Constitution entitles every citizen to participate in the government of the country, either directly or through freely elected representatives. It is illogical for that Constitution to provide, as it does in Articles 20(4) and 39, 67 and 77, as amended, that no person shall be compelled to belong to a political party and in the same breath to provide that no person shall run for the office except through a political party.
4. The right of every citizen to participate in the government under Article 21(1) of the Constitution is to be exercised according to a procedure set by, or under, a law. While participation through a political party is a procedure, the requirement that participation shall be through a political party only is not a procedural matter but a substantive condition taking away the right to participate for citizens who do not belong to political parties.

5. When a constitutional provision enacting a fundamental right appears to conflict with another constitutional provision the court is enjoined to incline to the realization of the fundamental rights and may disregard the other provision if its application would result in injustice; it is the fundamental rights, and not the restrictions on them which are fundamental. It is the fundamental rights which the court is enjoined to guard jealously, not the restrictions;
6. The amendments made in Articles 39, 67 and 77 of the Constitution, restricting the right to contest in elections to political party candidates only, are capable of being abused to confine the right of governing to a few and to render illusory the emergence of a truly democratic society. Notwithstanding those restrictions, it shall be lawful for private candidates to contest elections along with political party candidates.

The Attorney General was aggrieved by this decision. He lodged a notice of appeal, but later abandoned the intended appeal. Instead, the government vigorously pursued the aforementioned Bill before the National Assembly. On December 2, 1994, the House passed that Bill, which became to be known as the Eleventh Constitutional Amendment Act, 1994. The President assented to it on January 17, 1995. Silently, but only for several years, the citizen's right to contest an election as an independent candidate remained buried. Rev. Mtikila, who in its judgment, the High Court described as "a determined man", was of the opinion that the constitutional amendments were invalid. He challenged their constitutionality before the High Court. A Bench consisting of Manento, J.K, Massati and Mihayo, JJ, heard the Petition. It agreed with the petitioner. The learned Judges held that the impugned amendments were violative of the democratic values and principles enshrined in the Constitution and also violative of the doctrine of basic features. In the course of their judgment, they said:

"... we wish to make it very plain that in our view Act No. 34 of 1994 which amended article 21(1) so as to cross refer it to Article 5, 39 and 67 which introduced into the Constitution restrictions on participation of public affairs and the running of the government to party members only was an infringement on the fundamental rights and that the restriction was unnecessary and unreasonable, and did not meet the test of proportionality. We thus proceed to declare that the said amendments to Article 21(1), 39(1) (c) and 67(1)(b) are unconstitutional.

The learned Judges made these findings after having made a very long analysis of the issues before them and shortly after having quoted with approval Mwalimu Julius K. Nyerere's following observations in his book, **Our Leadership and the Destiny of Tanzania**, published in 1995:

"This is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of, and amendments to, all its provisions?"

The learned Judges also cited with approval the following observations by Professor Issa Shivji, made in his article, **Constitutional Limits of Parliamentary Powers**, which was published in 2003 in a special edition of the journal **TANZANIA LAWYER**:

"... the power to amend the Constitution is also limited. While it is true that parliament acting in constituent capacity ... can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution."

The Attorney General was aggrieved by the learned Judges' decision. He appealed against it to the Court of Appeal. Although that Court did not formally allow the appeal, in effect it did so. It strongly disagreed with the High Court's decision. It held, among other things, that:

1. The word law in Article 13(2) of the Constitution of the United Republic of Tanzania means ordinary law, and, therefore, that word's meaning does not include constitutional amendment.
2. The doctrine of basic features recognized and applied in some foreign jurisdictions is nebulous and lacks a litmus test.
3. The only limitations on Parliament's powers of amending the Constitution are the provisions of article 98 of the fundamental law.
4. The doctrine of basic features is, for reasons stated in paragraphs (2) and (3) above, not part of the constitutional law of Tanzania.
5. Courts of law in this country do not have power to amend the Constitution.
6. The Constitution must be interpreted as a whole. The doctrine of harmonious interpretation is applicable to that extent only. A court of law has no power to disregard any provision of the fundamental law. Where one provision is irreconcilable with another, a court of law is impotent to make a decision thereon. In that situation, the court must refer the disharmony to parliament for a solution.

The Court of Appeal concluded its judgment with the following unforgettable words:

“[T]he issue of independent candidates has to be settled by Parliament which has the jurisdiction to amend the Constitution and not the Courts which, as we have found, do not have that jurisdiction. The decision on whether or not to introduce independent candidates depends on the social needs of each [S]tate based on its historical reality. Thus the issue of independent candidates is political and not legal.”

The Court could, and perhaps should, have stopped there, but it preferred to part with the appeal after volunteering the following advice:

“However we give a word of advice to both the Attorney General and our Parliament: The United Nations Human Rights Committee, in paragraph 21 of its General Comment No. 25 of July 12, 1996, said as follows on Article 25 of the International Covenant on Civil and Political rights, very similarly worded as Article 23 of the American Convention and our Article 21: ‘The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.’ Tanzania is known for our good record of human rights and particularly our militancy for the right to self-determination and hence our involvement in the liberation struggle. We should seriously ponder [over] that comment from a Committee of the United Nations, that is, the whole world.”

The independent candidates’ system was thus buried again; this time by a court of justice! No one knows for how long, and who will resurrect it. What one knows is that it will have to be the Court of Appeal, Parliament or the people themselves in the exercise of their sovereignty.

As will be recalled, the Court of Appeal held that the doctrine of basic features, otherwise known as the doctrine of basic structure, is nebulous. Is it so? To answer that question correctly we need first to have correct understanding of the essence of the doctrine. That doctrine is one of the great judicial innovations made by the Supreme Court of India. It was first evolved in *Golak Nath v. State of Punjab*, A. 1967 S.C. 1643. It can be said to have been firmly established in *Kesavananda v. State of Kerala*, A. 1973 S.C. 1416. The innovation over-ruled the established rule of constitutional interpretation that all parts of a written constitution and all its guarantees have equal importance. According to the doctrine, the power to amend a constitution cannot be exercised in such a manner as to destroy or emasculate the fundamental features or the basic structure of the instrument. The underlying rationale of the doctrine in India, according to the Supreme Court, is not only the fact that the

Indian Constitution is a fundamental law, but because the manner the instrument came into existence. It was made by the PEOPLE through their Constituent Assembly, and thus the people gave themselves a constitution. According to that Court, that being how the constitution was made, the people could not possibly have intended their creature - Parliament - to have powers to change the very face of their product, hence the limitation on parliamentary powers of amendment. As every lawyer knows, the Constitution of the United Republic of Tanzania, 1977, was similarly made. The application of the doctrine of basic features to the interpretation of that instrument is, therefore, a necessity.

Having described the essence of the doctrine, I turn now to the question whether the said doctrine is, as was held by the Court of Appeal, nebulous. According to the Court, that label must be tied to the doctrine because, as it put it, "there is no agreed yardstick of what constitutes basic [features] of the constitution." With great respect, there may be lack of unanimity on the status of individual provisions in the Indian Constitution, but the same cannot be said with regard to the meaning of the doctrine itself. The Court of Appeal does not appear to have given its attention to the leading judgments of Supreme Court on the proper approach which a judge should adopt when confronted with the question whether a particular facet of a constitution is part of the basic structure or is a basic feature. In *L. Chandra Kumar Etc.Etc v. The Union of India and Others*, [1997] 2 SCR 1186, Ahmad, C.J, cited with approval the approach formulated by Chandrachud, J., in *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 that proper approach for a judge who confronted with such question is to examine, in each individual case, the place of the particular feature of the scheme of the constitution, its object and purpose, and the consequences of its denial on the integrity of the constitution as a fundamental instrument of the country. This approach was expressly adopted by Bhagwati, J, in *Minerva Mills Ltd. V. India*, AIR 1980 SC1789. This approach has, of course, not been regarded as the "definitive" test in this field of the constitutional law. The word "definitive" is defined by the Oxford Advanced Learner's Dictionary on Current English as follows: "final; to be looked upon as decisive and without the need for, or possibility of change or addition." The test does not close the door to improvement on it. As I hope to demonstrate later in this lecture, notwithstanding that lack of perfection in the test, the doctrine of basic features is said to be of great use in India. In any case, why should the features of the constitution which are incontestably paramount not be so regarded?

The Court of Appeal based its rejection of the doctrine on some other grounds: first, Article 98 of our country's Constitution adequately provides for stiff requirements for amending some of the provisions of the fundamental instrument. With respect, it is submitted that this ground also lacks merit. The Court of Appeal's attention was apparently not drawn to the fact that the Supreme Court of India applies the doctrine notwithstanding that the Constitution of that country requires that certain stiff conditions be met before certain provisions of the Constitution are amended. The proviso to sub-article (2) of Article 368 of that fundamental instrument lays down that the amendment by way of change of any of the five areas listed therein will require to be ratified by the Legislatures of not less than one-half of the States. One of the agonizing effects of the Court of Appeal's judgment is that, subject to compliance with the provisions of Article 98, now Parliament can repeal and replace any provision of the Constitution in any manner it wants. Could the framers of the fundamental instrument have intended to confer on the legislative organ almost unlimited amending powers? Was the power of amendment intended to include the power to destroy or emasculate basic democratic values and principles enshrined in the fundamental law? The Court of Appeal's answer to these questions would be: YES. If that answer is correct, it follows, if logic is to prevail, that in its constituent capacity our Parliament is competent in law to make the following amendments to the Constitution:

- a. Repeal the provisions establishing a republican system and replace them with provisions establishing a monarchy;
- b. Repeal Article 40(2) which restricts presidential terms to two, each being of five years, and substitute therefor a provision establishing life presidency;
- c. Repeal the provisions assuring Tanzanians of the enjoyment of fundamental rights and freedoms mentioned therein and replace them with provisions empowering the executive or a representative thereof to decide what rights and freedoms, if any, and when and where the people will be entitled to enjoy them;
- d. Dissolve itself and transfer its legislative powers to the Cabinet;
- e. Abolish the current court system by repealing the relevant provisions and establish a new system whereby courts are wholly manned by laymen and laywomen and controlled by the President's Office through the ministry responsible for legal affairs;

- f. Repeal Article 107A and B and substitute therefor provisions making courts accountable to Parliament or subjecting their decisions to revision by that organ's Committee;
- g. Amend the Fifth Chapter of the fundamental law by conferring on the Public Accounts Committee of the National Assembly, a body which is not a court of law and its members are not judicial officers, the power to find a public servant guilty of theft in the course of employment and thereafter remit the matter to a court of law for sentence;
- h. Repeal Article 98 and substitute therefor a provision authorizing the alteration of any provision of the Constitution by a simple majority or, even worse, by votes of a quarter of members of the Parliament present in the House;
- i. Under the guise of exercising power of constitutional amendment or alteration, repeal and replace the whole Constitution. That is what was done to the 1964 constitution when the 1965 constitution was enacted. However it must be pointed out that in 1965 there was no basic structure doctrine, and more importantly, the repealed constitution was not made by a constituent assembly, unlike the constitution currently in place, namely, the Constitution of the United Republic of Tanzania, 1977.

I submit that prior to the delivery of the Court of Appeal's judgment Parliament had no power to do any of these things. Sadly, as a result of that judgment, it now has. It would be extremely risky to bank upon the wisdom of Members of Parliament in averting parliamentary authoritarianism. The amendment or alteration is not the same thing as destruction or abrogation. The legislative organ does not have power to make amendments whose result would be to render the Constitution an empty shell or which would make aspirations of the people, firmly and solemnly declared in the preamble to the fundamental instrument, no more than high sounding words of no practical significance.

Article 98 of the Constitution does, of course, confer power on Parliament to regulate the exercise of fundamental rights and freedoms, but the Legislature can not destroy, emasculate or damage any of those rights or freedoms or their essence. The Article could not have been intended by the framers of the Constitution to be used as a licence to suffocate democracy or rule of law or to denude our people of their rights. The doctrine which, according to the Court of Appeal, is

nebulous, is said to have worked wonders in India. In his book, **Indian Constitutional Law**, 4th ed., Professor M.P Jain describes the positive role the doctrine has played in the field of constitutional law in that country. He writes as follows, at p. 895:

“During the period 1981 to 1984, there were many straws in the wind to amend the Constitution in several directions which might have distorted the Constitution out of recognition, but the government felt shy of moving these amendments as it was not sure of the response of the Supreme Court. It is a safe assumption that the basic features theory has protected the Constitution from being mutilated out of recognition at the altar of political expediency.”

There is no reason to suspect, leave alone to believe, that the doctrine cannot work in our country.

The learned Justices of Appeal seem to have an erroneous notion of the doctrine. That doctrine does not make the basic features of the constitution unamendable. What it prohibits, and correctly so, is the destruction, emasculation or damaging of those features or the essence thereof and the basic structure. The doctrine would afford greater protection of democratic values and principles enshrined in our country's Constitution than would do the safeguards contained in Article 98. If, for example, Parliament amended Chapter 5 of the fundamental law by establishing a Supreme Court above the Court of Appeal that could not be said to offend against the doctrine. If, however the amendment sought to subject decisions of the High Court or the Court of Appeal to revision by a body outside the Judiciary that would be violative of the doctrine, for it would purport to destroy some of the basic democratic values and principles enshrined in the Constitution, including the doctrine of separation of powers. In the course of their judgment the learned Justices observed:

“These eight matters [matters listed in List Two of the Second Schedule to the Constitution] could have been basic structures in the sense that Parliament cannot amend them. However, they are amendable once the procedure for amendment is followed. So, there is nothing like basic structures in our Constitution.”

With profound respect, the recognition by our courts of the existence in our constitutional law of the doctrine of basic features would not, as already remarked, make any provision in the Constitution unamendable. If the Court of Appeal found the test formulated by Chandrachud, J., as to what constitutes a basic feature unsatisfactory, why did it not venture to improve upon it or even to formulate a new one? There are many

judgments by the Supreme Court of India in various cases in which the doctrine of basic features has been analysed with great care and admirable clarity. One wishes that the Court of Appeal had considered at least some of them in its judgment and improved upon Chandrachud, J.'s test, if there was room for such step. As a wing of the State that court is by itself a source of law.

The Court of Appeal's second reason for refusing to apply the doctrine of basic features was the caution on the application of the doctrine voiced by Professor Dietrich Conrad, a German scholar who is credited with being the originator of the ideas on which the doctrine is based. Referring to that caution, the Court observed:

"... We may also point out that even Prof. Conrad himself conceded that there is no litmus test as to what constitutes basic structure. He wrote: in one of his essays carrying the title "Basic Structure of the Constitutional Principle:

'Finally, a note of caution might not be out of place. The jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution... Tightening of judicial scrutiny would be necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchword'."

I am unable, not for not trying, to understand this passage as indicating that Professor Conrad was advocating the rejection of the doctrine of basic features. What he urges therein is the tightening of judicial scrutiny. Is it really beyond the capacity of our judges to discharge that task? Do we have to wait for judges outside our jurisdiction to lead the way? Judicial innovation is the need of the hour in the field of constitutional law. Our judges should believe enough in themselves. In any case, have some of the brilliantly crafted judgments of the Supreme Court of India not enormously deprived the Professor's remarks much of their weight?

I turn now to the third reason which the Court of Appeal used in its refusal to apply the doctrine of basic features to the interpretation of the Constitution of our country. This concerns the meaning to be attached to the word "law" in article 30(5) of the said Constitution. Relying on the opinion of Khanna, J., in *Kesavananda's* case that the word in Article 13(2) of the Constitution of India meant an ordinary law and not a Constitutional Amendment Act, the Court of Appeal held that that was the meaning to be attached to our aforementioned constitutional provisions. With great respect, I am unable to share that view. In India,

before the Constitution(24th Amendment) Act, 1971, which came into effect on 5th November, 1971, the word “law” in Article 13 meant both an ordinary law and a Constitutional amendment, in accordance with the view taken by Subba Rao, C.J., for the majority in *Golak Nath v. State of Punjab*. Clause (4) of the Constitution Amendment Act was inserted in the Bill to override that majority view. The amendment was declared void by Supreme Court in the *Minerva Mills’* case. In the Constitution of Tanzania there is no provision identical with or similar to that clause. It must, therefore, be correct to say that the Court of Appeal did not direct itself correctly on the point. Surprisingly, it gave no reason or reasons why it preferred to ignore the decision in the *Minerva Mills’* case, as a result of which, as already indicated, the opinion of Khanna, J., on the meaning to be attached to the word “law” in Article 13(2) became no longer valid. Be that as it may, in *Kesavananda’s* case the Supreme Court did not hold that Parliament in India has an unlimited power of amendment after complying with the provisions of Article 368.

Finally, as far as the doctrine of basic features is concerned, the Court of Appeal was also of the opinion that accepting that doctrine would open a floodgate to petitions similar to the one the decision on which gave rise to the appeal before the Court. It said:

“We may as well add that apart from the legal argument we have advanced there is a purely practical issue. Where will we stop? The argument is that the provisions of Article 21 have been abridged since a candidate has to belong to and be sponsored by a political party. The next complaint will be why should a parliamentary candidate be required to be of the age of 21 years and a presidential candidate be a citizen born in Tanzania? Why do we exclude those born outside the Republic simply because their parents were faithfully serving the Republic outside the country? Are all these not abridging Article 21?”

The learned Justices ask: “Where will we stop?” I will venture to answer the question. They should stop when denial or emasculation of fundamental rights and freedoms perpetrated in the name of constitutional amendments ends, if that will ever occur. Justice cannot be denied to a party because some other persons may use the party’s victory as a peg on which to hang similar claims. If I may borrow the language Mr. Justice Kayode, a former Justice of the Supreme Court of Nigeria, used in his article, *The Role of the Judge in Advancing Human Rights*, published in the journal, *DEVELOPING HUMAN RIGHTS IN JURISPRUDENCE*, Vol.3, at p.100:

"If floodgate it entails, let there be one, once it is a matter of [fundamental] rights."

I propose now to turn my attention to the doctrine of harmonious interpretation. Rightly, the Court of Appeal was of the opinion that it is a court's duty, when interpreting the Constitution of the United Republic of Tanzania, to harmonise its provisions. But the Court did not stop there; it proceeded to say this:

"...If there are two or more articles or portions of articles which cannot be harmonized, then it is Parliament which will deal with the matter and not the Court unless that power is expressly given by the Constitution, which, we have categorically said, it has not"

With greatest respect to their Lordships, this observation cannot, in any considered opinion, be correct. Whereas each pillar of the State has, in the course of performing its functions, the power and responsibility of interpreting the Constitution, where there is a litigation touching on what are said to be rights or obligations of someone, body or society, the courts, according to the Article 107A of the fundamental instrument, have the last say on the outcome of it. Courts are not authorized by law to transfer or delegate that power to another State organ, nor would it be in the interests of justice to do so. There are grave dangers in permitting Parliament or the Executive to have the last say on the interpretation of a Constitution. Those dangers are very ably described by Professor Jain in his book I have already made reference to, as follows, at p. 836:

"...There are overwhelming reasons as to why the courts should act as authoritative expounder of the Constitution and possess power of judicial review. A written Constitution would be reduced to mere paper document in the absence of an independent organ to interpret, expound and enforce the same. The power of constitutional review by some organ of government is implicit in the concept of a written onstitution which seeks to confer limited powers. In the absence of an accepted authority to interpret the Constitution, a written Constitution would promote discord rather than order in society when different organs of the government take conflicting action against the individual. The legislature and the executive are politically partisan bodies and are committed to certain policies and programmes which they wish to implement and, therefore, they cannot be trusted with the final power of constitutional interpretation. They would often bend the Constitution to their own views and accommodate their own policies and the Constitution would thus become a plaything of the politicians. The Judiciary is by far and large free from active political bias and so can be expected to expound the Constitution dispassionately,

apolitically, coolly and with some sense of detachment, to the extent it is humanly possible to achieve a mental condition in human beings... Judicial review helps in channelizing the acute and extreme controversies of the day into legal channels."

Be that as it may, one feels compelled to ask: if the Court of Appeal's stand on irreconcilable provisions of the Constitution is correct, what can a court of law which refers the problem to Parliament do if the legislative organ unanimously or otherwise disagrees with the court's opinion that the provisions in question are irreconcilable? Will that situation not inflict a very serious damage to the dignity of the court concerned, if not that of the whole Judiciary? If I may respectfully say so, one needs only to pose these two questions to expose the dangers and weakness of the Court of Appeal's decision on the point. With due respect to the learned Justices, to proceed on the basis of their decision is to invite confusion in the field of constitutional law in the country. It is submitted that when a court is confronted with the problem of disharmony between constitutional provisions that cannot be solved by invoking the doctrine of harmonious interpretation, it should adopt the approach of the Supreme Court of Ireland. Describing it in his book, **The Irish Constitution**, 3rd Ed, at p civ, Professor J.M. Kelly states:

"Side by side with the doctrine of harmonious interpretation, and needing to reconcile with it, there has lately emerged the judicial view that some Articles of the Constitution are more important than others, and must in a case of conflict, take priority over them."

Six authorities are cited by the author in support of those observations. The author also cites the following passage in the judgment of Finlay, C.J., in *The Attorney General (The Society for the Protection of Unborn Children (Ireland) Ltd. V Open Door Counselling Ltd*, [1988] IR 593:

"I accept that where there exists an interaction of constitutional rights the first objective of the courts in interpreting the Constitution and resolving any problem thus arising should be to seek to harmonise such interacting rights. There are instances, however, I am satisfied, where such harmonization may not be possible and in those instances I am satisfied, as the authorities appear to establish, that there is a necessity to apply a priority of rights."

This approach appeals to such intellect as I possess. It is consistent with the doctrine of separation of powers and, I hasten to add, justice. I can see nothing wrong with the subordination of one provision to another. It is a permissible canon of interpretation.

To digress, if I may, from the examination of the judgment of the Court of Appeal, I would refer to an anonymous article, **Insight into Court of Appeal's Verdict on Independent Candidates**, published in the CITIZEN Newspaper on July 31, 2010, an article which was intended to defend the aforesaid judgment. In the course of it the author makes a number of startling propositions. The following is one of them:

"It is crystal clear to me that there is nothing in our Constitution which is more important than the very existence of the Union [of Tanganyika and Zanzibar]."

With greatest respect, I cannot bring myself to agree with that opinion. Is the right to life, assured in Part III of the Constitution not more important than the Union? That Union may break or be dissolved, but even if that event occurs the people of "Tanganyika" and those of Zanzibar should still be entitled to enjoy that most precious fundamental right. No State organ can abolish human rights. Even the people themselves have no such power. Human rights, as correctly pointed out by Lugakingira, J., in his judgment, are not gifts from the State; they inhere in a person by virtue of birth. The Union of the United Republic of Tanzania, on the other hand, is a man's creation.

To revert to the judgment of the Court of Appeal, it should be pointed out that in *The People v Shaw* [1982] IR1, a case discussed by Professor J.M Kelly in his aforementioned book, the Supreme Court of Ireland is said to have fully and expressly acknowledged the principle of hierarchy of constitutional rules and rights. Kenny, J., with whom three of the other four Judges agreed, partly said:

"There is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail".

The learned author reveals that the decision in that case has been followed in a series of recent decisions by the Supreme Court. Constitutional interpretation demands creativeness on the part of judges. As Professor Jain says, to quote from his book again:

"Judicial review is not merely a sterile function of interpreting an "i" here and an "a" there, but it is a creative role which the courts discharge ... Constitutional interpretation is a more creative function than statutory interpretation."

It cannot be disputed, I submit, that fundamental rights and directive principles of State policy are the conscience of a democratic Constitution. Failure to pay due weight to them would upset the equilibrium built therein.

In *Ashok Kumar Gupta and Another v State of V.P and Ors.*, [1997] 3 S.C.R. 269, at pp 308-309, Ramaswamy, J., speaking for the Supreme Court of India, said:

“The Constitution, unlike other Acts, is intended to provide enduring paramount law and a basic design of the structure and power of the State and rights and duties of the citizens to serve the society through a long lapse of ages. It is not only designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. It contains a framework of mechanism for resolution of constitutional disputes. It also embeds its ideals of establishing an egalitarian social order to accord socio-economic and political justice to all sections of the society assuring dignity of person and to integrate a united social order assuring every citizen fundamental rights assured in Part III and the directives in Part IV of the of Constitution. In the interpretation of the Constitution, words of width are both a framework of concepts and means to the goals in the Preamble. Concepts may keep changing to expand and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth. The intention of the Constitution is, rather, to outline principles than to engrave details.... The judge must be atune with the spirit of his/ her times. Power of judicial review, a constituent power has, therefore, been conferred upon the judiciary which constitutes one of the most important and potent weapons to protect the citizens against violation of social, legal or constitutional rights. The judges are participants in the living stream of natural life, steering the law between the dangers of rigidity on one hand and formlessness on other hand in the seamless web of life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator’s wisdom, historian’s search for truth, prophet’s vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself or herself from every personal influence or predilections.”

Our Court of Appeal’s function is to interpret the provisions of the Constitution and arrive at a correct and just decision and not to “half –interpret” those provisions and thereafter surrender the noble function to an organ unauthorised by law and ill-equipped to perform it. If I may respectfully say so, our superior courts would , I think, do very well in the field of constitutional law if they are adopted the principles alluded to by Ramswamy, J., in the passage quoted a short while ago.

The Court of Appeal expressed the opinion, among others, that courts in this country do not have the power to amend the Constitution,

that function being that of Parliament. With respect, that observation is perfectly correct, but it was not necessary in the resolution of the issues before the Court. Rev. Mtikila did not ask the High Court (or the Court of Appeal itself) to amend the paramount law of the land. What he asked it to do was to declare that the constitutional amendments in question were unconstitutional on the ground that they were violative of Article 21 of the Constitution. That is not a prayer to usurp parliamentary powers. The Petitioner's contention was in essence that the purported amendments could not in law become part of the Constitution as they were *void ab initio* or, to use a modern expression, void from their inception.

The Court of Appeal also emphasized the importance of one State pillar avoiding encroaching on the functions of another. No believer in democracy can possibly fault that statement, but as already pointed out, Rev. Mtikila did not ask the High Court to perform a function of Parliament. What he asked that Court to do was to perform one of its own chief functions, namely, interpreting the Constitution and, thereafter, declaring that Parliament lacked legal competence to enact the constitutional amendments which purported to abrogate a citizen's right to take part in a public election as an independent candidate. Plainly, that is not a function of Parliament. In reaching their judgment the learned Justices of Appeal do not appear to have given due weight to the fact that the Constitution of the United Republic of Tanzania has accorded the High Court a dignified and crucial status as a chief guardian and trustee of the Constitution. That Court is enjoined by law to keep all State organs, including Parliament, within bounds. It is a function which must be performed innovately, responsibly, efficiently and boldly. Constitutional interpretation is a democratic function. Judges must give effect to the ideals and fundamental concepts engraved in the Constitution.

Is the principle of free and fair elections not a basic feature of the Constitution of the United Republic of Tanzania? In India that principle has been held to be a basic feature of that country's constitution: see *Kihota V. Zachilhu*, A.1993 S.C 412 and *Indira V. Rajnarain*, A. 1975 S.C. 2299. The right to freedom of association, guaranteed by Article 20 (1) of our Constitution, is one of the most important rights in a democracy. But that right stands side by side with the right to freedom of dissociation, guaranteed by sub-article (4) of that Article. Under the Constitution, a citizen is free to join a political party or not, as he pleases. In other words, no one may be compelled, directly or indirectly,

to join a political party or to keep away from its membership. The compulsion of membership of, or sponsorship by, a political party is a serious denial of the right to freedom of dissociation. The constitutional amendments whose constitutionality Rev. Mtikila challenged in his Petition purported to destroy that right and also the right to freedom to participate in public affairs guaranteed by Article 21 of the Constitution. It should also be pointed out, I think, that - and here I am content to adopt the words of Lugakingira, J - "it is contrary to every notion of free elections if non - party citizens are compelled to vote for party candidates." Basic democratic values or ideals and principles enshrined in the Constitution must be fully respected and protected.

At least those features in the fundamental law which are incontestably basic should be so treated by all State organs including Parliament and the Courts. These include:

1. Supremacy of the Constitution
2. Unity and integrity of the State
3. Sovereign, democratic structure
4. Rule of law
5. Separation of powers
6. Independence of the judiciary
7. The essence of fundamental rights and freedoms
8. Judicial constitutional review
9. Principle of free and fair elections
10. Secular character of the Constitution
11. Limitations on the amending power of Parliament.

Amending power that is qualified by the provisions of Article 98 only would leave it open to a political party with a two - thirds majority in Parliament to reduce the Constitution to politicians' plaything. By holding that the only principles which qualify that power are the rules laid down in Article 98, the Court of Appeal, sadly, has given Parliament a black cheque to mutilate the Constitution at the altar of political expediency. I wish, in this context, to draw attention to the very wise words of Professor Jain in his aforementioned book, at page 895:

"A constitution is national heritage and not the property of one single party howsoever mighty it may be and no single party has thus a right to institute amendments in the party interest rather than in national interest".

It is a primary function of judges in this country to zealously protect the democratic values and principles enshrined in the country's Constitution. They must refuse, whatever the cost to themselves, to reduce the fundamental law to an empty shell. It is not even wise to imagine our judges leading the country to that destination.

The Court of Appeal, as will be recalled, concluded its long consideration of the issue concerning independent candidates by saying:

"The decision on whether or not to introduce independent candidates depends on the social needs of each State, based on its historical reality. Thus the issue of independent candidates is political and not legal"

Was the Court right to hold, as in effect it did, that the issue concerning independent candidates was purely political? With profound respect, it was not. In one sense or another, a constitutional interpretation is a political matter. But it is also perfectly correct to say that every such interpretation is a legal issue. Such issue must necessarily be justiciable. I wish to quote four passages from three text books to support these propositions. The first passage is from a book, **Constitutional Democracy in Africa**, Volume 3, at pp 59-60, by Professor Ben Nwabueze:

"Once a justiciable question...is brought before a court by a competent party, the court is under an inescapable duty to hear and decide it, unless its jurisdiction in the matter is otherwise excluded by an ouster clause contained either in the constitution or other law validly made. It is not in the court's power to decline jurisdiction of such suit ; it has no discretion in the matter, and is therefore not at liberty to refuse to hear and decide it simply because it is politically explosive or sensitive, or because it is likely to embroil the judiciary in the politics of the people or provide a conflict between it and the political organs, or intricacy makes it especially difficult of determination by a court, or because it is more appropriate for resolution through the political process or because the court's involvement in it is for any other reasons considered inexpedient or impolitic... What was said by Chief Justice John Marshall as long ago as 1821 remains valid today as guiding principle of judicial action. "The judiciary", he said, "cannot as the legislature may, avoid a measure because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decide the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution"

The second of the four passages is from Professor Duga Das Basu's book, **Shorter Constitution of India**, 12th ed., at pp 313-314.

It reads:

"... the Judiciary will not enter into 'political questions' or questions which involve 'policy'. But the Courts cannot shirk their duty of interpreting the constitution. Hence, a question cannot be brushed as a political question if it involves the interpretation of provisions..."

The next passage is to be found in Professor Jain's book, at pp.847-848. It reads as follows:

*"A question is raised at times whether the courts should entertain a political question. Many Constitutional law questions have political overtones. Should the courts refuse to take cognisance of such questions? If the courts do so, then the scope of constitutional litigation will be very much reduced and no readymade machinery may be available to solve such questions raising tension in body politics. [In **Rajasthan v India**, AIR 1977 S.C 1361 the Supreme Court said] that it would not entertain a purely political question which does not involve determination of any legal or constitutional right or obligation. The court is concerned only with adjudication of legal rights and abilities. But merely because a question has a political complexion, that by itself is not ground why the court should shrink from performing its duty under the constitution if it raises an issue of constitutional determination. A constitution is a matter of purest politics, a structure of power. Merely because a question has a political colour, the court cannot fold its hands. So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed, it is its constitutional obligation to do so."*

The last passage, so far as the question whether the Court of Appeal was right in holding that the issue concerning independent candidates was political and not legal is concerned, is to be found in Professor Nwabueze's book, at pp 62-63

It reads:

*"...in the field of constitutional law, in which nearly all questions are in their nature political, a constitution being a charter for the conduct of the political relations of a people, the discretion with which the courts are invested by the doctrine [of the political question] is capable of being extended to cover infinite categories of questions. The character of constitutional questions as political has and should have no bearing on the jurisdiction of the court to hear and determine them, if they are otherwise justifiable... As was said by Justice Dixon in **Melbourne v Commonwealth of Australia** [1947 C.L.R. 31], it is not a question whether the considerations are political, for nearly every consideration arising from the constitution can be so described."*

Justiciability is beyond a shadow of doubt a very important concept in the administration of justice. It is perfectly correct to say that not every dispute is capable of being, or should be, resolved by a court of law. Two of the best examples of matters which are non - justiciable are, perhaps, these: (1) the one which Mergarry, V.C. , mentions in *Malone V. Metropolitan Police Commissioner* [1979] Ch 344 where he observes, among other things, that he cannot believe that “the court could, or should , grant a declaration that, for instance, a referee in a football match was right (or wrong) in awarding a penalty kick”; (2) whether a particular economic programme will benefit the common man. If, however, a dispute relates to a legal, equitable or constitutional right or obligation the defendant or, as the case may be, the respondent cannot, however, political the dispute may otherwise be, successfully raise a plea of non - justiciability.

I submit that, though the issue concerning independent candidates may have been a political one in a certain sense, it was justiciable because it related to the interpretation of constitutional provisions and the determination of the legal issue, among others, whether a citizen has a fundamental right to contest a public election as an independent candidate and whether, if the answer to that question was in the affirmative, that right is basic feature of the Constitution. It is submitted that any dispute whether certain constitutional amendments impede or prejudice the holding of fair elections is a legal issue and not a purely political question.

Let us assume, for a moment, that the Court of Appeal was right in holding that the issue concerning independent candidates was a purely political one. That assumption, I think, makes one entitled to ask: Why did the Court decide to enter a political arena by giving advice to Parliament and the Attorney General on a political matter? In its judgment the court advised those two authorities to “seriously ponder (over the) comment by a committee of the United Nations that is, the whole world.” The comment referred to in that advice reads as follows:

“The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or specific parties.”

It is puzzling why, as appears to be the position, if it agreed entirely with the comment, the Court felt unable to frown upon the unreasonable curtailment of the citizen's right of dissociation made by the constitutional amendments Rev. Mtikila complained against.

The learned Justices of the Court of Appeal also considered the issue whether, in amending Article 21 of the Constitution of the United Republic of Tanzania, Parliament did more than alter the provision of that Article. In the course of doing so, they said:

“...Parliament can alter “any provision” of the Constitution. We wish to emphasize “any provision” of the Constitution. Altering has been defined by Art 98 (2) to include:

‘...modification or correction of those provisions or repeal and replacement of those provisions or the re-enactment or modification of the application of the provisions’. We have no doubt in our minds that what the Eleventh Amendment did was altering Article 21 as explained above.”

With greatest respect, this concluding remark suffers from a serious incorrectness. The amendment did not just alter the provision in question; it destroyed or, to put it more accurately, it purported to destroy the fundamental right of a citizen to contest an election without being a member of, and sponsored by, a political party. As already observed, to amend or alter does not mean to destroy. To compel those who wish to contest in State elections to join political parties and be sponsored by those organisations is a very undemocratic step. The amendment inflicted a very serious disability on a citizen who does not wish to join a political party. That amendment and the other two offended against the great principle of equality before the law. They unreasonably created two distinct classes of citizens when it came to state elections: those who qualified to contest the elections as they were party members, and those who were barred from doing so because they were not. Can a court of law, in order to permit justice to triumph, disregard clear words in a constitutional provision while discharging its salutary duty of interpreting the provision? The Court of Appeal would not allow that in any circumstances. In the course of judgment, it said “[a] court can never ever disregard the clear words of a provision of the Constitution. That will cause anarchy.” The word “anarchy” is defined in the Oxford Advanced Learner’s Dictionary of Current English as “absence of government or control, disorder; confusion”. Pondering over the above words of the Court of Appeal, one feels compelled to seek an explanation why Tanzanians should behave so irrationally if superfluous words in a provision of the Constitution are disregarded by a court of law in order to reach a just decision. Why Tanzanians should become disorderly instead of praising noble efforts to make the fundamental law a solid foundation of democracy and rule of law and a store-house of social

justice? Is it really true that the people of this country would reject those efforts and prefer authoritarianism of Parliament? Is everyone in society not bound to respect decisions of courts even if they are inclined to disagree with them or to consider them erroneous? Why should a court's step of pre-empting an individual becoming a victim of injustice, in the electoral field or otherwise, arouse anger from the people? Can anarchy be averted by giving way to injustice? Is it not justice which averts anarchy? Would the anarchy referred by the Court of Appeal not be caused by those in authority who would not like our people to enjoy their fundamental rights and freedoms?

As regards the possibility of confusion taking place, it is, I think, enough to say that it is far more likely that that event will occur if superfluous words are left to hang in the Constitution than if they are excised. In any case, a judge would not lightly embark upon that course of action, there being a strong presumption that the framers of the Constitution intended every word therein to be an integral part of the instrument. The excision would be carried out only where justice and common sense clearly call for that step being taken. Be that as it may, is justice not the surest foundation of stability? Which State organ, other than the judiciary, can tame parliamentary authoritarianism, which usually is initiated or put in motion by the executive arm of the State? Shockingly, the Court of Appeal said it cannot because, in its opinion, it does not have the power to perform that very important function in a democracy. As one eminent jurist once remarked making fundamental rights easily amendable would make those rights a mere adornment as they will be right without remedies. It must never be forgotten that the people of this country did not surrender their sovereignty to Parliament when they resolved to create that organ. By enacting, through the Constituent Assembly, the Constitution of the United Republic of Tanzania the people reiterated, among other things, their refusal to recognise parliamentary supremacy which, as is correctly pointed out by Professor Jain, "in the context of the practical working of the parliamentary system... actually boils down to supremacy of the executive government of the day, because parliamentary powers are at the disposal of the government of the day." Since 1961 it is the doctrine of supremacy of the Constitution which is in force in this country.

I wish now to devote my attention to an issue, a very important one, which neither the High Court nor the Court of Appeal considered in their respective judgments. It will be recalled that Parliament enacted the impugned Constitutional amendments abolishing the system of

independent candidates after Lugakingira, J. had declared the said system to be an essential part of representative democracy under Article 21 of the Constitution. In effect, the learned Judge struck down the said constitutional amendments. He delivered his judgment, it will be recalled, on October 24, 1994. As already pointed out, the President assented to the Bill which, in effect, annulled the learned Judge's decision. Powers of Parliament, like those of the Executive and the Courts, are defined, fettered and restrained. Since that organ is a creature of the Constitution, it is like the other two pillars, bound to make decisions which are consistent with the fundamental instrument, from which its powers emanate. Parliament cannot sit on appeal against a decision of a court of law. It cannot act as a revisional authority in relation to such decision. It enjoys no liberty to make intrusions on purely judiciary terrain. It cannot, therefore, annul, over-ride or set aside a court's decision. Plainly, any such action would be unconstitutional on the ground that it is a violation of the doctrine of separation of powers. Parliament can, of course, validate an Act by removing the infirmity indicated in a judgment, but it cannot merely annul, over-ride or set aside the judgment. See *State of Orissa and Others v. Gopal Chandra Rath and Others* [1995] Supp. 3S.C.R.816, 824; *State of Tamil Nadu v. M/S Arooran Sugars Ltd.* [1996] Supp.8S.C.R. 193, 213, *The State of Maharashtra and Others v. Kumari Tanuja* [1999] 1 S.C.R. 315, 323 and the four cases cited therein. It is stating the obvious to say that there was no infirmity indicated in Lugakingira, J's judgment which could be removed. Having held that the purported constitutional amendments in question were unconstitutional, the learned Judge proceeded, in effect, to remove the said infirmity. After that judgment no infirmity remained in the constitutional provisions in question. By enacting the constitutional amendments which Rev.Mtikila challenged before Manento, J.K., Massati and Mihayo, JJ, Parliament purportedly annulled, over-ride or set aside Lugakingira, J's judgment. That usurpation of power was clearly a violation of the Constitution. The fact that the Bill was tabled before the National Assembly before Lugakingira, J., delivered his judgment is utterly immaterial, that is to say, of no legal consequence whatsoever. As already pointed out, the issue concerning that unconstitutionality was not raised before the High Court or dealt with by that Court. It is respectfully submitted that the Court of Appeal should have regarded itself compelled by the interests of justice to deal with it after, of course, giving counsel for the parties opportunities to address it on the point, or to remit the question to the High Court for its consideration. As matters

now stand, in future no judgment of a court of law in this country will enjoy immunity from nullification by Parliament. Subordination of courts to the other State pillars, including Parliament, is totally unacceptable. That will usher in dictatorship in the country.

Separation of powers is a doctrine of great importance in the governance of a country, but in this country that doctrine has been placed in serious jeopardy by the Court of Appeal's judgment. It is not possible to guess how long it will take to have that serious damage rectified. I devoutly hope that between now and then Parliament will exercise great restraint. "If one party in the majority changes [the constitution] today", writes Professor Jain (at p.933 of his afore - quoted book) , "another party in the majority will change it tomorrow and the constitution will cease to claim respect of the people on which it depends for its efficacy and survival." The law abhors arbitrariness regardless of who the author of it is. Like other organs of the State, Parliament enjoys no freedom to act arbitrarily. The legislative organ must play its role in the protection of fundamental rights and freedoms. On the other side of the coin, judges, who are supposed to constitute a special reservoir of wisdom, must always remember that their functions are inseparable from the fate of democracy, the heart and core of which system is judicial process.

In the course of their judgment the learned Justices of Appeal addressed themselves on the issue concerning the need to maintain cordial relations between the three pillars of the State. They said:

"Prof. Kabudi gave the historical background of the decision in the Kesavananda. He said it was a result of a struggle between the Executive and [the] Judiciary which started over the government's bid to effect land reforms soon after independence. Prof. Kabudi went on to cite pronouncements of Prime Minister Jawaharlal Nehru as evidence of the struggle. We do not think that it is necessary to delve into that for the purpose of this judgment except to say that at no time in the history of this country have we had sour relationship between the Executive and the Judiciary. That is extremely healthy and we wish to maintain it unless it is absolutely necessary to depart from it."

Maintenance of administrative harmony between the Judiciary and the other two pillars of the State is unquestionably a very useful thing in the governance of a country, but the desire to achieve that relationship cannot be permitted to stand in the way of justice. Total or unqualified harmony between the three pillars would unavoidably have its victims: justice, democracy and rule of law. That kind of relationship would not serve the supreme interests of the people. Unyielding courage of

judges is a priceless asset of any country. There is no substitute for it. Judges must not hesitate to make decisions they consider just however unpopular those decisions are likely to be to Parliament, the Executive or political parties, including the ruling party, and regardless of their impact on the relations between the Judiciary and the other pillars of the State. Their destination must be justice. That is their only highway. They must always play their role in ensuring that an amendment to the paramount law of the land “promotes in the minds and hearts of the people a deep emotional respect for the Constitution as a symbol having sanctity and permanence.”

Distinguished Provost; Distinguished Dean; Distinguished Associate Dean; Distinguished Academics; Ladies and Gentlemen, I hope that the opinions I have endeavoured to share with you this afternoon have enabled you to have a better understanding of the Court of Appeal’s judgment. I propose to end my lecture by echoing the celebrated words of Abraham Lincoln, one of the greatest Presidents of the United States of America, who in 1865 lost his life at the hands of an enemy to human rights and democracy:

“A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments is the only sovereign of a free people.”

Appendix: Events in Pictures



As assistant legal adviser to the delegation of Tanzania at the Annual Session of the General Assembly of the United Nations. Photo taken in New York, September – December 1967.



Lord Denning, accompanied by Lady Denning, visited Tanzania in 1975. Here he posed for a photograph with members of the Attorney General's Chambers. At that time Justice Samata was Director of Public Prosecutions. The photograph was taken in Dar es Salaam.



February 2001 in Bangalore, India: Members of the Judicial Group (Comprising Chief Justice Mainur Reza Chowdhury of Bangladesh, Chief Justice Keshar Prasad Upadhyay of Nepal, Chief Justice M.L. Uwais of Nigeria, Chief Justice B.A. Samatta of Tanzania, Chief Justice B.J. Odoki of Uganda, Deputy Chief Justice Pius Langa of South Africa, Chief Justice P.V. Reddi of Karnataka State of India) met in Bangalore, India, under the Chairmanship of Judge Christopher Weeramantry, former Vice President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia acting as Rapporteur, and adopted the *Bangalore Draft Code Of Judicial Conduct*.



Delegates to the seminar to mark the 25th Anniversary of the Court of Appeal of Tanzania. The photo was taken on the 16th September 2004, in Dar es Salaam



Inspecting the Guard of Honour mounted by the Field Force unit of the Tanzania Police Force to mark his retirement from the bench. Photo taken on the 19th July, 2007 in front of the Court of Appeal building, in Dar es Salaam.

Mr. Justice Barnabas Samatta retired from the bench in July 2007 after a distinguished legal career spanning 41 years. During four decades of active life he was a State Attorney and the Director of Public Prosecutions. He also served at the High Court of Tanzania and the Court of Appeal. At his retirement, he had spent seven years as Chief Justice of the country, thus at the helm of one of the three branches of the State.

This book reproduces some of the leading judgments written by Justice Samatta. It highlights, in a critical fashion, some of the high points of his beliefs and observations as embedded in his decisions and speeches. This is to celebrate him as an example of an ethical lawyer whose integrity cannot be questioned, making him a worthy model for the younger generation to emulate and draw inspiration from.

Justice Samatta's decisions touched on key areas of: RULE OF LAW AND THE CONSTITUTION, where he emphasized that the Constitution crystallizes a consensus among citizens as to the nature and character of their polity and governance; ACCESS TO JUSTICE, about which he believed that the doors to justice should be opened to all regardless of their station in life or economic position; ETHICS, INTEGRITY AND PROFESSIONALISM where he frequently quoted Nyerere *'There are some jobs in our society that can be done by unethical people... Being a judge or magistrate is not one of these jobs...'*; and ENVIRONMENTAL LAW where he argued *'The vulnerability of our planet has reached such a depressing degree that there is no greater service judges can render to mankind than playing their role in the protection of the environment...'* He summarized his life-long conviction by saying: *'Let everyone in our society give justice a chance to prevail.'*



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